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CURRENT EVENTS.

THE first prosecution under the criminal clause of the Interstate Commerce Law was had before United States District Judge Thayer and a jury, in Hannibal, Mo., June 1. The case will, of course, attract general attention, particularly as the defendant was convicted of the charge of unjust discrimination in the fixing of railroad rates. On page 524 of this issue will be found a statement of the case and the charge of the judge to the jury, which is a clear exposition of the law applicable to the third section of the act.

WHETHER the decision, lately rendered by the United States Supreme Court, in the Myra Clark Gaines Case, does or does not exhaust the possibilities of litigation, over the issues involved, is a question concerning which authorities differ. The fact that the case has been decided by the highest judicial tribunal in the land should, under ordinary circumstances, be regarded as disposing of the matter forever. But all deductions from experience are liable to be at fault when applied here. More than a quarter of a century ago, Justice Mayne, of the supreme court, predicted that Mrs. Gaines' suit would be pronounced by the future historian the most remarkable case in the annals of American jurisprudence. Even then, it had been some twenty-five years in progress, and had come before the supreme bench no fewer than five times. The litigation was begun in 1834. It appears to be ended in 1889. The immense bulk of the record can be imagined, when it is stated that it requires two strong men to lift the mass, and that the printing cost $10,000. Mrs. Gaines survived two husbands, who spent their fortunes in assisting her to fight the city of New Orleans, and then she died, too soon to reap the reward of her life-long forensic struggle. Though the decree lately rendered is in favor of her heirs, yet of the enormous sum involved in the whole litigation, a part has been consumed in costs, and another part lopped off, by the court, as not sufficiently ascertainable to become the subject of an award.

Perhaps the most edifying conclusion to be drawn from a view of this celebrated case is that, although Hamlet may have been mad, there was much method in his madness, when he enumerated "the law's delay's" among the causes which may well drive a person to suicide.

THE report of the eleventh annual meeting of the Alabama State Bar Association, held in December, 1888, has come to us. We have found in its perusal much pleasure and food for reflection. The address of the president, Wilbur F. Foster, contains an interesting collection of the more important recent enactments of congress and the several States. His plea for a more uniform system of legislation, and illustrating the unfairness of the present condition of the law, by a reference to the subject of marriage and divorce laws in the different States was well presented. Had the address been prepared a few weeks later, he would have had the case of Pennegar v. State[1] as a text, showing the diversity of the laws of Tennessee and Alabama, where that, which by the former State is declared a crime, the latter State seems to think commendable. The paper by Mr. Inge, on "Lawyers in Politics," contained statistics on the subject which are full of interest. Perhaps the most interesting paper, and certainly that which excited the most discussion, was that by Mr. W. C. Ward, suggesting reforms in procedure in the Alabama courts. He advised the abbreviation of opinions by appellate courts, the abolishing of the law allowing a debtor to prefer a creditor, and especially called attention to the hardships resulting from the maintenance in separate tribunals of law and equity jurisdictions, urging a union of the two in all courts, a proposition which precipitated a vigorous discussion among the members. The paper of Mr. R. T. Simpson, on "Legal Education and Admission to the Bar," was a statement of the requirements for admission to the bar in the various countries and States. Mr. Thomas

[1] Published in full and annotated 28 Cent. L. J. 380

H. Watts, Jr., read a paper entitled "To what Liabilities do the Exemption Laws Extend?" which was full of Alabama law. And Mr. John Randolph Tucker came all the way from Virginia to tell the Alabama bar about the law as administered by Bracton and Glanville in the thirteenth century.

NOTES OF RECENT DECISIONS.

THE quandary of a suitor desiring to bring an action against a municipal corporation when there is no officer in existence on whom process may be served is discussed by the United States Supreme Court in Amy v. City of Watertown, 9 S. C. Rep. 530. The charter required service on the mayor. The mayor had resigned, and there was no successor, and service was made upon the ex-mayor and also on the city clerk, and an active member of the executive board. The provision as to holding over did not apply to resignation, for another provision of the charter declared that resignations should take effect when filed. The court held that there was no one upon whom process could legally be served. They say:

The question then is reduced to this, whether, in case the mayor has resigned, and there is no presiding officer of the board of street commissioners (a body which seems to take the place of the common council of the city for many purposes), service of process on the city clerk and on a conspicuous member of the board is sufficient. If the common law (which is common reason in matters of justice) were permitted to prevail there would be no difficulty. In the absence of any head officer, the court could direct service to be made on such official persons as it might deem sufficient. But when a statute intervenes and displaces the common law, we are brought to a question of words, and are bound to take the words of the statute as law. The cases are numerous which decide that where a particular method of serving process is pointed out by statute, that method must be followed, and the rule is especially exacting in reference to corporations. Kibbe v. Benson, 17 Wall. 624; Alexandria v. Fairfax, 95 U. S. 744; Settlemier v. Sullivan, 97 U. S. 444; Evans v. Dublin, etc. Co., 14 M. & W. 142; Walton v. Universal Salvage Co., 16 M. & W. 438; Brydolf v. Wolf, 32 Iowa, 509; Hall v. Atl. & Pac. R. Co., 64 Mo. 561; Lehigh Valley Ins. Co. v. Fuller, 81 Pa. St. 398. The courts of Wisconsin strictly adhere to this rule. Conger v. Railroad Co., 17 Wis. 478; City of Watertown v. Robinson, 59 Wis. 513; City of Watertown v. Robinson, 69 Wis. 230. The two cases last cited related to the charter now under consideration. In the first case, service was made upon the city clerk and upon the chairman of the board of street commissioners whilst the board was in session, in the absence of the mayor, who could not be found after diligent search. The court, after referring to the provisions of the charter and the revised statutes on the subject, say: "The question whether the revised statutes control as to the manner of service is not a material inquiry here, because both the charter and general provision require the service to be made upon the mayor, but no service was made upon that officer, as appears by the return of the sheriff. The principle is too elementary to need discussion, that a court can only acquire jurisdiction of a party, where there is no appearance, by the service of process in the manner prescribed by law." In the last case (decided in 1887) service was made in the same manner as in the previous one, and the court say: "When the statute prescribes a particular mode of service, that mode must be followed. *Ita lex scripta est.* There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this court to require further citations. * * * When the statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be made excludes all others. The temporary inconvenience arising from a vacancy in the office of mayor affords no good reason for a substitution of some other officer in his place, upon whom service could be made, by unwarrantable construction not contemplated by the statute." * * * Individuals may be actuated by improper motives, and may take advantage of defects and imperfections of the law for the purpose of defeating justice. The mayor of Watertown may have been actuated by such a motive in resigning his office immediately after being inducted into it. But he had a legal right to resign; and if the plaintiffs are prejudiced by his action, it is *damnum absque injuria.* The plaintiffs are in no worse case than were the creditors of the city of Memphis after the repeal of its charter and the establishing of a taxing district in its stead. The State has plenary power over its municipal corporations, to change their organization, to modify their method of internal government, or to abolish them altogether. Contracts entered into with them by private parties cannot deprive the State of this paramount authority. See Meriwether v. Garrett, 102 U. S. 472. The cases of Broughton v. Pensacola, 93 U. S. 266, and Mobile v. Watson, 116 U. S. 289, cannot aid the plaintiffs in this case.

AN interesting question of contributory negligence in crossing railroad tracks, was decided by the Supreme Court of Indiana, in Penn. Ry. Co. v. Stegmeier, 20 N. E. Rep. 843. There it was held that if a railway company maintain for years a gate and flagman at a busy street crossing, in accordance with a city ordinance, the absence of the flagman, and his permitting the gate to remain open, constitute an affirmative assurance to one having knowledge of such practice that the crossing is safe at the time, and therefore the latter cannot be said, as a matter of law, to be guilty of contributory negligence in attempting to cross without taking the precautions usually required to discover approaching trains. The court says:

Here the failure of the company to obey the local law gave the deceased assurance that the tracks were clear and the crossing safe, but, when he had gone upon the crossing, he found two trains rapidly approaching him, one from the east and one from the west, and the fact that he met his death by being struck by one of them does not authorize the inference that he was guilty of such contributory negligence as bars a recovery; for he was thrown off his guard, and exposed to a sudden danger that he had a right to expect would not be encountered. If he had carelessly gone upon the track at a crossing where there were no gates or no flagman required, we should have a very different case, but he was not negligent in going upon the tracks, because he was justified in believing that there were no approaching trains. It was the act of the appellant, and not his own, which created this belief. It was through no fault of his that he entered a place of danger. The case at bar is to be discriminated from those in which the injured person enters upon a track where there in no affirmative assurance of safety, for here the fact that the gates were up and no warning given by the flagman was an affirmative assurance of safety, upon which a citizen might act without being chargeable with negligence. This case is essentially unlike one where the only negligence is the mere failure to sound a whistle or ring a bell, for here the assurance was that there was no train near the crossing. This assurance constitutes the distinctive feature of this class of cases, for the reason that it is in the nature of an invitation to cross and of a declaration that there are no approaching trains. This essential feature clearly marks the case—distinguishes it from such cases as Railway Co. v. Hedges, 20 N. E. Rep. 530. The case before us belongs to that class in which railroad companies are held responsible because they put the traveler off his guard and lead him into danger. The general rule upon this subject is thus stated by one of our text-writers: "Where a person is ignorant of the location of a crossing, or where the circumstances are such as to mislead him as to the duty of looking or listening for the approach of a train, he cannot, as a matter of law, be said to be guilty of negligence *per se* for neglecting to do so. Thus where, as is the case in some localities, the company maintains gates at certain crossings, which are closed at the approach of a train, he has, if they are open when he is near the crossing, a right to rely upon it that it is safe for him to cross; and if the company neglects its usual duty, and does not close them, or otherwise notify travelers of the approach of a train, it cannot relieve itself from liability simply because the traveler neglected to look or listen for himself." 2 Wood, Ry. Law, 1328; 2 Shear. & R. Neg. § 466; Railway Co. v. Schneider, 17 N. E. Rep. 324. * * * It was said by Treat, J., in Trust Co. v. Railway Co., 27 Fed. Rep. 159, that "at the crossings in a populous city, where gates and watchmen are provided, passengers and pedestrians have a right to suppose when the gates are opened, and no warning to the contrary given by the watchman, that they can proceed with entire safety. If accidents should happen through the gross negligence of the management of the gates by the watchman connected therewith, *prima facie* the railway company must answer for the damages sustained. Trifling matters as to the movements of the passenger or pedestrian in crossing under such circumsances cannot exonerate the railway company, whose duty it was to protect said crossing and give warning as to safety thereof." In Wanless v. Railroad Co., L. R. 6 Q. B. 481, L. R. 7 H. L. 12, it was said that "it appears to me that the circumstance that the gates at this level crossing were open at this particular time amounted to a statement and a notice to the public that the line at that time was safe for crossing, and that any person who, under those circumstances, went inside the gates with a view of crossing the line might very well have been supposed by a jury to have been influenced by the circumstance that the gates were open. Then, when inside the gates, the boy who in this case was injured saw what was inconsistent with the gates being open, namely, he saw one train passing; and it may very possibly be the case that that circumstance embarrassed him, and that, his eyes and attention being fixed upon that particular train, when it passed out of the way he failed to see the other train." The reasoning of the judge from whom we quote forcibly applies to this case. The deceased was not simply thrown off his guard, but he was also assured that there were no approaching trains, and this assurance dispensed with the vigilance that under other circumstances would have been required of him. This assurance, too, completely relieved him from the imputation of negligence in going upon the tracks; and the evidence of the approach of trains from opposite directions an instant after he entered on the track supplies sufficient ground for the inference that his failure to see and avoid the train was attributable to the confusion produced by the sudden peril to which the wrong of the company had inexcusably exposed him. Railroad Co. v. Boggs, 101 Ind. 522; Gearny v. R. R. Co., 101 N. Y. 519; R. R. Co. v. Hutchinson, 120 Ill. 589.

THE question as to the power by *mandamus* to compel the approval of an official bond, came before the Supreme Court of Florida, in State v. Barnes, 5 South. Rep. 722. It appeared here that M was elected to the office of sheriff, and presented his bond to the comptroller for approval. The comptroller refused his approval because one of the sureties had withdrawn, and the circumstances in reference to the assent of the others to the withdrawal were such that in his opinion there was serious doubt as to the validity of the bond. It was held that the question of the legality of the bond was one directly within his discretion, and his determination in regard to it, even if wrong, cannot be controlled by *mandamus*, and that while *mandamus* is a proper remedy where an officer, in the performance of discretionary duty involving a right given by law, bases his refusal of the right on a matter or ground outside of his discretion, it is not available where said matter or ground is within the discretion to be exercised by him. The court says:

The rule long established and governing in this State is thus given by Mr. High: "In all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, *mandamus* will not lie, either to control the exercise of that discretion or to determine upon the decision which shall be finally given. And wher-

ever public officers are vested with powers of a discretionary nature as to the performance of any official duty, or in reaching a given result of official action they are required to exercise any degree of judgment, while it is proper by *mandamus* to set them in motion, and to require their action upon the matters officially intrusted to their judgment and discretion, the courts will in no manner interfere with the excercise of their discretion, or attempt by *mandamus* to control or dictate the judgment to be given." High, Extr. Rem. § 42. See Towle v. State, 3 Fla. 202; State v. Van Ness, 15 Fla. 317; McWhorter v. Railway Co., 5 South. Rep. 129. * * * A further contention for the relator is that *mandamus* is the "proper remedy for compelling the approval of official bonds, where it appears that the officer or the court invested with discretionary authority has acted mistakenly or unwisely by the reason given for refusing to approve, and which thus resolves itself into a question of law." This, as we understand it, is entirely subversive of the rule itself. If official discretion cannot be controlled or overridden by *mandamus* except for abuse of it, what matters it in any given case that the discretion has been guided by a mistaken reason? The prohibition to interfere does not lose its force because a wrong reason has led to a wrong conclusion. The books abound in cases where the courts refuse *mandamus* notwithstanding the mistake or error of the officer whose discretion is sought to be controlled, and it would be an anomaly to hold that refusal is proper where only a wrong conclusion is reached without giving the reason for it, but not proper if the reason be given, and it is found not a good one. Looking to the autorities quoted to sustain the contention for relator, the first, State v. County Court, 41 Mo. 221, must be discarded, because the writ was granted there to relieve against abuse of discretion. Nelson v. Edwards, 55 Tex. 389, was a case in which the court said that, if the bond offered by Edwards was rejected by the commissioners to approve, because in their opinion Nelson was entitled to the office, *mandamus* would lie, evidently because the commissioners went outside of their discretion in at all considering the controversy between the parties as to which of the two was entitled to the office. Gulick v. New, 14 Ind. 93, was a case where the clerk whose duty it was to approve sheriffs' bonds, refused because another was in the office claiming title to it. Like the last case, the discretion exercised extended to a question of contested title to office, and the court held that *mandamus* was proper, as a *prima facie* showing of title was sufficient to entitle the applicant to approval of his bond, otherwise sufficient. Case of Prickett, 20 N. J. Law, 134, was another similar case of disputed title to office, as was also the case of Beck v. Jackson, 43 Mo. 117. Daniels v. Miller, 8 Colo. 542, 9 Pac. Rep. 18, was a case where the clerk refused to approve an appeal-bond because the court held that appeal did not lie. The supreme court, holding that the law did allow appeal in the case, ordered *mandamus*. State v. Lewis, 10 Ohio St. 128, was a case where the officers to approve sheriffs' bonds refused because in their opinion the bond was not presented within the time for approval required by law. The court, holding that the commissioners mistook the law as to the time for presenting bonds, granted *mandamus*. Insurance Co. v. Cleveland, 76 Ala. 321, was a case where the clerk refused to approve an attachment bond because the sureties were non-residents of the county. The law of the State not requiring sureties to be residents of the county, the court, to relieve against the mistake of the clerk granted *mandamus*. The last two cases resting on mistake of law, it is important to observe that i was law not connected with the sufficiency of the bonds as to its form legality, and sureties and therefore law outside of the discretion given for the approval of bonds. The use of *mandamus* in such cases does not conflict with the general rule. And in regard to all these cases it will be seen that what appears to be a departure from the rule is not so in fact. They only check the exercise of discretion when assumed in regard to matters not properly within it, or when mistake is made in law not germane to the discretion. It remains to adjust the present case to our view of the law as herein expressed. It cannot be said that the respondent, in refusing to approve relator's bonds, acted capriciously or arbitrarily. It appears from the petition itself that he was indulgent to relator, giving his counsel, when asked, time and opportunity to present the case in its fullest merits, and even to fortify it by supplemental papers. And respondent, in his return, states that he had legal advice to aid him in his decision; so there is every indication that he exercised his discretion with due deliberation, and in good conscience; and there is no suggestion that he did not. It is not a case, then, in which it can be justly claimed that the law authorizes *mandamus* because of capricious or arbitrary action. Nor is it a case calling for *mandamus* because respondent went out of the way to exercise his discretion on any question not properly within it, or because he gave a reason, if a wrong one, for his decision, on a question to which his discretion did not properly reach. In either case, we have seen that *mandamus* has been allowed. But it should not be here, because the discretion was exercised, and the reason for the decision given, on questions which were of the very essence of the sufficiency of the bond.

In a prosecution for assault, with intent to commit rape, it is essential for the court to charge that the force intended to be used must be such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case. The Supreme Court of Texas so holds, in Brown v. State, 11 S. W. Rep. 412. They say:

The State's case, then, is an assault with intent to rape by force, and to warrant conviction the evidence must show force, and this force must be of a certain character, viz.: "Such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case." Pen. Code, art. 529. This article constitutes a part of the definition of "rape" or "assault to rape," when force is relied on for conviction. Make this provision a component part of article 528 of the Penal Code, and we would have this definition of "rape:" "Rape" is the carnal knowledge of a woman, without her consent, obtained by such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and the other circumstances of the case. An assault with intent to commit rape is constituted by an assault, or an assault and battery, with intent to have carnal knowledge of the female by the use of such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case. To be guilty of thi·

offense the accused must have intended to accomplish his purpose by the use of this character of force. This proposition is absolutely correct, for, if his intention falls short of this, it would be impossible for him to be guilty of an assault with intent to rape; because we have seen (threats and fraud not being in the case) that, to constitute rape, such force must be actually used. Therefore the conclusion is inevitable that, to be guilty of an assault with intent to rape, the accused must have intended to use such force; it being impossible for him to intend to rape, without intending to do that which constitutes rape. See 1 Bishop Crim. Law, §§ 729, 731, 745. There can be no doubt of the soundness of this doctrine. We have seen that in law a man does not intend to commit a particular offense, if the act he intends would not, when fully performed, constitute such offense. The conclusion from all the authorities is that nothing short of the specific intent to commit the substantive offense will answer. And in rape, and in assault with intent to commit rape, the party cannot be said to intend to commit the substantive offense unless he uses or intends to use all such force as is necessary to overcome all resistance; and unless the jury are so charged, the charge will fail to inform them as to what is requisite to constitute the substantive crime.

Wilson, J., dissents, saying:

According to my understanding of the statute, if a man assaults a woman with the specific intention to have carnal connection with her by force, against her will, he commits the offense of assault with intent to rape. The assault is the use or attempted use of force, and the intent requisite to constitute the crime is not an intent to use the force contemplated in article 529, *supra*, or any specific character of force, but is an intent to forcibly, and against the will of the woman, have carnal connection with her. The force intended to be used by the assaulting party may not be such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case; yet if there was an assault, and the assaulting party intended to ravish the woman, or at least to make the attempt to do so, taking the chances of being able to accomplish his design, I think he would be guilty of an assault to rape. To illustrate: A man meets a woman in day-light in a city, on a public street, in the presence of hundreds of people. He is a small, delicate man; she is a large, athletic woman. He assaults her, and attempts to throw her down, and the evidence conclusively shows that his intent is to have carnal knowledge of her without her consent. He could not reasonably suppose that he could overcome her resistance, or that the people present would allow him to accomplish his design, yet he may unreasonably believe that perchance he can succeed, and may make the effort under such unreasonable belief, willing to take the chances of the venture. Would he be guilty of an assault with intent to rape? I think he would, but under the opinion of the majority of the court, as I understand it, he would not be guilty of that offense.

THE power of a telegraph company to restrict its liability, was considered by the Supreme Court of New Mexico, in Western Union Tel. Co. v. Longwill, 21 Pac. Rep. 839. There it was held that a telegraph company cannot stipulate that it will not be liable for damages on account of negligence in the delivery of a message, unless a claim therefor in writing is presented within sixty days from the date of the receipt of the message. The court says:

In Railroad Co. v. Lockwood, 17 Wall. 357, Mr. Justice Bradley, after an exhaustive discussion of the question of the power of the common carrier to stipulate for exemption from liability on account of negligence, or want of proper care on the part of the carrier or its agents, sums up the conclusions of the court as follows: "(1) That a common carrier cannot stipulate for exemption from responsibility, when such exemption is not just or reasonable in the eye of the law. (2) That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants." While the weight of authority is perhaps against classing a telegraph company as a common carrier, still the same reason that makes void the contracts of common carriers for exemption from responsibility for the negligence of the carrier or its employees, makes void the same kind of contracts of telegraph companies. Telegraph Co. v. Blanchard, 68 Ga. 299; Tyler v. Telegraph Co., 60 Ill. 421; Telegraph Co. v. Cohen, 73 Ga. 522; Telegraph Co. v. Dryburg, 35 Pa. St. 298; Telegraph Co. v. Brown, 58 Tex. 170. While telegraph companies are not charged with all the duties and responsibilities of common carriers, they cannot contract for restriction of liability for injuries occasioned by culpable negligence or gross carelessness, or willful misconduct of their employees. White v. Telegraph Co., 14 Fed. Rep. 710. The courts are divided in opinion as to whether a stipulation between the sender of a message and the company, provided that a claim for damages shall be presented within a day named, or within a reasonable time, can be entered into and upheld as a contract. Instead of being a reasonable business regulation, we think the condition named and annexed to the message was an effort on the part of the company to restrict its legal liability to sixty days. It would introduce into the local jurisprudence of every State, territory, or country in which it is sued a species of private statute of limitation, or non-claim. It would avoid the policy of the State or territory in the matter of the time in which actions both in tort and contract should be brought. But aside from this we think there can be no sound reason for holding that in cases where no contract for total immunity from legal responsibility can be made, none can be made for a conditional release or discharge, because public policy alike denies the power to contract on the subject in either instance. In support of this view, in addition to the cases herein referred to, we cite the following: Johnston v. Telegraph Co., 33 Fed. Rep. 362; Telegraph Co. v. Cobbs, 47 Ark. 344, 1 S. W. Rep. 558; Telegraph Co. v. McKibben, 14 N. E. Rep. 894.

As to the effect of a release and discharge of a joint *tort feasor*, the Supreme Court of Pennsylvania, in Seither v. Phil. Traction Co., 17 Atl. Rep. 338, hold that, where one injured by a collision between two cars of different companies accepts a certain sum in full of all claim for the injuries against one of the companies, and executes a release, in which he agrees to prosecute the other company, and reimburse the first out of the amount recovered, such agreement and release bar an action for the same injuries against the other company, citing Tompkins v. Railroad Co., 66 Cal. 165.

PROSECUTION BY INFORMATION.

I. When an Information will Lie.—The fifth amendment to the constitution of the United States provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." Whether a crime is an "infamous" one, within the meaning of this provision, depends upon the character of the punishment which a conviction will entail, rather than upon the effect of such conviction upon the party's competency to testify as a witness.[1] But neither this constitutional provision nor the phrase "due process of law" in the fourteenth amendment can operate to prevent the States from adopting the procedure by information, even in capital cases.[2]

In early times informations were principally, if not exclusively used, in the federal courts, in prosecutions for the recovery of fines and forfeitures, such as those imposed by the revenue and embargo laws,[3] or the stamp laws,[4] or liquor laws;[5] but in more recent times this mode of instituting a prosecution has become more general in those courts, several respectable cases holding the doctrine that no crime is "infamous," within the meaning of the constitution, that has not been declared to be so by congress;[6] a conclusion in which the supreme court does not concur, however.[7]

In California, murder may be prosecuted by information.[8] In Indiana, one charged with felony may demand that he be so prosecuted without delay.[9] In Louisiana, in other than capital cases, the district attorney may elect to prosecute either by indictment or information.[10] In Hampshire, a crime not capital nor punishable by imprisonment for more than one year, may be charged in an information.[11] In Texas, misdemeanors punishable by imprisonment may be so prosecuted.[12] And in Connecticut, the holding of an indecent exhibition, may be.[13]

But where a statute requiring an indictment is repealed, an information will not lie for an offense committed prior to the repeal;[14] nor can an information be filed at a term of court at which the accused was recognized to appear, after the discharge of the grand jury without finding an indictment.[15]

II. What is an "Infamous" Crime.—The true distinction between infamous and non-infamous crimes, as respects the use of informations in their prosecution, is undoubtedly this: A crime punishable capitally, or by inprisonment in a State's prison, or penitentiary, is infamous—one not so punishable is not. Thus, it has been held that an offense punishable by imprisonment for a term of years, at hard labor, is infamous;[16] and punishment by imprisonment for more than one year has been held to be "infamous" pun-

[1] *Ex parte* Wilson, 6 Crim. L. Mag. 667, 672, disapproving, as to this point, a number of United States circuit and district court decisions. U. S. v. Shepard, 1 Abb. (U. S.) 431; U. S. v. Maxwell, 3 Dill. (U. S.) 375; U. S. v. Block, 4 Sawy. (U. S.) 211; U. S. v. Miller, 3 Hughes (U. S.), 553; U. S. v. Baugh, 4 *Id.* 501, 1 Fed. Rep. 784; U. S. v. Yates, 6 Fed. Rep. 861; U. S. v. Field, 21 Blatchf. (U. S.) 330, 16 Fed. Rep. 778; *In re* Wison, 18 Fed. Rep. 33.

[2] Hurtado v. People, 110 U. S. 516; State v. Boswell (Ind.), 7 Crim. L. Mag. 743, and cases there cited.

[3] U. S. v. Hill, 1 Brock. 156, 158; U. S. v. Mann, 1 Gall. 3, 177; Walsh v. U. S., 3 Woodb. & M. 341; Story Const., § 1780.

[4] U. S. v. Isham, 17 Wall. (U. S.) 496; U. S. v. Buzzo, 18 *Id.* 125.

[5] U. S. v. Block, 4 Sawy. 211, 213.

[6] U. S. v. Wynn, 3 McCrary, 266; U. S. v. Petit, 11 Fed. Rep. 58; U. S. v. Cross, 1 MacArth. 149.

[7] *Ex parte* Wilson, 6 Crim. L. Mag. 667, 674. The word "indicted" in U. S. Rev. Stat., § 1032, has been held to include a prosecution by information. U. S. v. Borger, 19 Blatchf. (U. S.) 249.

[8] People v. Campbell, 59 Cal. 243, 3 Crim. L. Mag. 29. And the same rule prevails in Manitoba. Queen v. Connor, 2 Man. L. J. 235.

[9] Heanley v. State, 74 Ind. 99. See also Davis v. State, 69 Ind. 130.

[10] State v. Cole, 38 La. Ann. 843; s. p., Douglas v. State, 72 Ind. 383.

[11] State v. Ingalls, 59 N. H. 88.

[12] Reddick v. State, 4 Tex. App. 32.

[13] Knowles v. State, 3 Day, 103.

[14] People v. Tisdale, 57 Cal. 104.

[15] State v. Boswell (Ind.), 7 Crim. L. Mag. 743.

[16] *Ex parte* Wilson, 6 Crim. L. Mag. 667. See also Jones v. Robbins, 8 Gray (Mass.), 329, 349.

ishment.[17] On the other hand, it is held that stealing from the mails;[18] a conspiracy to make counterfeit coin;[19] passing base money so made;[20] and embezzlement,[21] are not infamous crimes within the meaning of the fifth amendment to the constitution of the United States.

While it is well settled that incompetency to be a witness is not the test of infamy in this connection, but rather the punishment to be inflicted upon the accused in case he be found guilty;[22] yet whether an offense, to the conviction and punishment of which a disqualification to hold office is appended by statute, is thereby made infamous, is a matter of some question.[23]

An "infamous punishment" is not to be limited to, or held to mean a "cruel or unusual punishment," because such punishments are absolutely forbidden by the federal and State constitutions, whether the procedure leading up to them be by indictment or information.[24]

III. FORMAL REQUISITES OF AN INFORMATION. —1. *The Affidavit or Complaint.* — In the federal practice, to properly institute a prosecution by information there must first be a complaint, supported by an oath or affirmation, showing probable cause, followed by an arrest and examination; and if the accused is held to bail or committed, the district attorney, on filing the magistrate's or commissioner's return with the proofs, will have leave to file the information.[25] In Indiana, the affidavit as well as the information must state that the defendant is in custody on the charge preferred against him, and that the grand jury of the county is not in session.[26] An information is necessary as well as an affidavit, and if there be no information, and no offer to file one, the affidavit will be quashed and the prosecution ended.[27] So also, the information will be quashed if the affidavit be insufficient, *e. g.* if it fail to name with certainty the county and State in which the alleged offense was committed.[28]

In Texas, also, a misdemeanor cannot be prosecuted in the county court by a mere complaint without an information;[29] and an information is insufficient, which, without itself alleging the inculpatory act, refers to the "affidavit which is herewith filed and shows" the commission of the act by the accused.[30] The affidavit is indispensable, and must appear as part of the record on appeal.[31] The "credible person" who may make it means a *competent* as well as a credible witness.[32] The essential facts may be stated on information and belief.[33]

2. *Form and Contents of the Information.*— No standard of penmanship is required in an information, and reference may be made to the supporting affidavit to solve a doubt as to the spelling of a word.[34] The information need not show that the accused has been held to answer, or that the charge has been found true by a grand jury;[35] or that there has been any examination before a committing magistrate;[36] or why the prosecution was not commenced by indictment.[37]

A description of the prosecutor as "prosecuting attorney," instead of as "county attorney," is not a fatal defect;[38] and it need not be alleged that he informs under his official oath.[39]

3. *Naming the Accused, or Person Injured.* —The name of the accused should be alleged, but an information for conspiracy may be against a single individual, naming the co-

[17] U. S. v. Todd, 25 Fed. Rep. 815. See also U. S. v. Brady (Star Route Case), 3 Crim. L. Mag. 69.
[18] U. S. v. Wynn, 3 McCrary (U. S.), 266, 9 Fed. Rep. 886.
[19] U. S. v. Burgess, 3 McCrary (U. S.), 278, 9 Fed. Rep. 896.
[20] U. S. v. Field, 21 Blatchf. (U. S.) 330; U. S. v. Gates, 2 Crim. L. Mag. 520.
[21] U. S. v. Reilly, 20 Fed. Rep. 46.
[22] *Ex parte* Wilson, 6 Crim. L. Mag. 667, 671, citing 4 Bl. Comm. 94, 95, 310; Cooley Const. Lim. 291.
[23] See U. S. v. Waddell, 112 U. S. 76, 82.
[24] *Ex parte* Wilson, *supra*, at p. 674.
[25] U. S. v. Shepard, 1 Abb. (U. S.) 431; U. S. v. Miller, 1 Sawy. (U. S.) 701.
[26] Lindsay v. State, 72 Ind. 39; State v. Henderson, 74 Ind. 23.
[27] State v. First, 82 Ind. 81. S. P., in Missouri, State v. Huddleston, 75 Mo. 667; State v. Sebecca, 76 Mo. 55; State v. Kelm, 79 Mo. 515; State v. Briscoe, 80 Mo. 643.
[28] State v. Beebe, 83 Ind. 171.
[29] Garza v. State, 11 Tex. App. 410.
[30] Brown v. State, 11 Tex. App. 451; Thomas v. State, 12 *Id.* 227.
[31] Wadgymar v. State, 21 Tex. App. 459.
[32] Thomas v. State, 14 Tex. App. 70.
[33] Toops v. State, 92 Ind. 13. S. P., Brown v. State, 11 Tex. App. 451. In Louisiana, however, such an affidavit is insufficient, and an amendment cannot be allowed. U. S. v. Theraud, 20 Fed. Rep. 62.
[34] Irwin v. State, 7 Tex. App. 109.
[35] U. S. v. Moller, 16 Blatchf. (U. S.) 65.
[36] People v. Shubrick, 57 Cal. 565.
[37] State v. Frain, 82 Ind. 532.
[38] State v. Nulf, 15 Kan. 404.
[39] State v. Sickles, Brayt. (Vt.) 132.

conspirators;[40] and an *alias dictum* in the affidavit will not cause a variance between it and the information.[41] The information is amendable as regards names;[42] and it seems, the name of the person injured or killed, or intended to be, need not be alleged.[43]

4. *Conclusion and Signature.*—The conclusion should be, as in an indictment, "against the peace and dignity of the State;"[44] but where it concludes "against the form of the statute," etc., and the offense charged is not a statutory one, the words quoted may be rejected as surplusage.[45]

Where there are a number of counts the signature of the prosecuting officer may be affixed to the last count only, the pages of the instrument being all fastened together;[46] and the deputy district attorney may subscribe his principal's name.[47] An information may be good even though unsigned, if accompanied by the sworn complaint made before the prosecuting officer.[48]

5. *Filing.*—The information may be filed in the office of the clerk of the court, at the same time as the affidavit upon which it is founded;[49] or as soon as convenient;[50] and if the information and its supporting affidavit be attached to each other, or if both be written on the same sheet of paper, and the clerk's file-mark be put upon the outside fold, it is a substantial compliance with the statutory requirement that the affidavit "shall be filed with the information."[51]

IV. Charging the Offense.—1. *In General.*—The information being the official act of the public prosecutor, and not the act of person upon whose affidavit it is based, it must clearly appear upon its face, that the charge against the accused is preferred by the official prosecutor.[52] The information must be self-sufficient, irrespective of the affidavit, though it should conform to the latter as respects all material averments. If necessary allegations are wanting in the information they cannot be supplied by the affidavit; it is the information, not the affidavit, that the accused is called upon to answer.[53] If a good and sufficient charge of the offense is set out, the insertion of unnecessary averments is not fatal.[54] So, if the allegations are positive, it is not essential that the preliminary examination of the prosecuting witness be in writing.[55] But an information merely charging the accused to be guilty, as the distinct attorney verily believes, is bad on motion to quash.[56]

An information for a first offense need not allege that it is for a first offense;[57] but an information for additional punishment must set forth the previous convictions with sufficient particularity to identify them, and show the character of the offenses charged.[58]

An information for a statutory offense must identify and distinguish it from every other, and set forth specifically its statutory components;[59] but in general, it is sufficient to follow the language of the statute; and if the defendant insist upon greater particularity, he must show that the case falls within some exception to the general rule.[60]

2. *Alleging the Acts Constituting the Offense.*—The acts relied upon as constituting the offense must be set out. Thus, an information for cheating, or for conspiracy to cheat and defraud, must set out and describe the pretenses and devices, and indicate the means whereby the cheat was to be accomplished, and specify the person or persons sought to be cheated;[61] an information for exhibiting a show must state acts of indecency, barbarity, or immorality, in order that the court may see whether the offense is within the statute, or is an offense at common law;[62] and where a penalty is imposed for "each hour of delay" in doing a certain act, an information which

[40] People v. Richards (Cal.), 6 Crim. L. Mag. 856.
[41] Harrison v. State, 6 Tex. App. 256.
[42] State v. Murphy, 55 Vt. 547.
[43] State v. Newton, 30 La. Ann. pt. II, 1253. And see Rivers v. State, 10 Tex. App. 177.
[44] Calvert v. State, 8 Tex. App. 538.
[45] Southworth v. State, 5 Conn. 325.
[46] State v. Paddock, 24 Vt. 312.
[47] People v. Darr, 61 Cal. 554; U. S. v. Nagle, 17 Blatchf. (U. S.) 258.
[48] Rasberry v. State, 1 Tex. App. 664.
[49] State v. DeLong, 88 Ind. 312.
[50] People v. Haley, 48 Mich. 495.
[51] Schott v. State, 7 Tex. App. 616.
[52] Prophit v. State, 12 Tex. App. 233.
[53] Pittman v. State, 14 Tex. App. 576.
[54] State v. Welch, 37 Wis. 196; Smith v. State, 85 Ind. 553.
[55] People v. Hare (Mich.), 7 Crim. L. Mag. 188.
[56] Vannata v. State, 31 Ind. 210.
[57] Kilbourne v. State, 9 Conn. 500.
[58] Wilde v. Com., 2 Metc. (Mass.) 408. See also Evans v. Com., 3 *Id.* 453.
[59] Hall v. People, 43 Mich. 417.
[60] Whiting v. State, 14 Conn. 487; Brewer v. State, 5 Tex. App. 248; People v. Lewis, 61 Cal. 366.
[61] People v. Arnold (Mich.), 3 Crim. L. Mag. 62; State v. Johnson, 1 Chip. (Vt.) 129.
[62] Knowles v. State, 3 Day (Conn.), 103.

omits to allege the number of hours delay with which the accused is charged, is fatally defective.[63]

Where the information names one offense and the facts stated in it constitute a different one, a conviction for the offense named will be set aside.[64]

3. *Charging Two or More Offenses.*—While, as a general rule, an information charging two or more distinct offenses is bad on demurrer[65]—as where larceny is charged in one count and embezzlement of the same property in another,[66] yet it is held in Kansas, that where the separate offenses are all misdemeanors of a kindred character, and charged against the same person, they may generally be joined in separate counts in one information, to be followed by one trial for all, with a separate conviction and punishment for each, the same as though all such offenses were charged in separate informations and tried at different times.[67]

However that may be in other jurisdictions, an information is not objectionable as charging two offenses, when it charges but one offense punishable by the authority prosecuting, even though another offense, cognizable in another jurisdiction, may be also set out therein.[68] And the allegation of a former conviction is not a distinct charge of another triable offense, so as to make the information objectionable.[69]

4. *Averments as to Time and Place.*—The averment as to the time of the commission of the offense must be of a day certain, prior to the filing of the information, and within the period limited for the prosecution of the offense;[70] and the date must not be an impossible one, such as "A. D. one thousand eight and seventy five."[71]

So also, the place of the crime must be stated in the information; the complaint cannot be referred to to supply the defect;[72] but if the venue is properly laid in the caption, the body of the instrument may refer to the caption for the venue.[73]

If the proof as to the *situs* of the crime differs from the allegation the variance will be fatal;[74] and the same is true as to the allegation of time of commission of the offense, where the affidavit and information do not agree;[75] but the particularity requisite in an information is not necessary in the supporting affidavit, nor are discrepancies between them material provided they accord in substance. They should agree as to the time and place of the offense, the names of the accused and injured party, and their allegations descriptive of the offense should substantially conform.[76]

V. AMENDMENT AND SUBSTITUTION. — In Kansas, where an information filed in February, 1883, charged that defendant *did*, in December, 1883, commit an offense, an amendment was allowed charging the figure "3" to "2," so as to show a date anterior to the filing of the information;[77] and where the original information is lost or destroyed, the county attorney may file another one, the original having been duly filed, even though no preliminary examination may have been had in the case, and although no copy of the original information may have been preserved.[78]

In Michigan, a variance between a promissory note on which the charge was based, and the information, the latter omitting the words "North Branch," appended to the date of the note, was cured by amending the information;[79] and in that State the assistant prosecuting attorney may make such amendments to the information as are authorized by statute, in the necessary absence of his superior, and with the permission of the court.[80]

In Missouri, where the name of the accused has been omitted in one of the blanks, the information may be amended, at the trial, on

[63] Linney v. State, 5 Tex. App. 344.
[64] Watson v. State, 29 Ark. 299.
[65] People v. Quvise, 56 Cal. 396.
[66] People v. De Coursey, 61 Cal. 134.
[67] State v. Chandler, 31 Kan. 201. See also State v. Schweiter. 27 *Id.* 499.
[68] State v. Smouse, 49 Iowa, 634. See also State v. Collins, 33 La. Ann. 152; Town of Eldora v. Burlingame, 61 Iowa, 32.
[69] People v. Boyle, 64 Cal. 153.
[70] State v. Ingalls, 59 N. H. 88; Kennedy v. State, 22 Tex. App. 693; Regina v. Ingalls. 42 L. T. 533.
[71] Blake v. State, 3 Tex. App. 149.
[72] Lawson v. State, 13 Tex. App. 83.
[73] Strickland v. State, 7 Tex. App. 34.
[74] Evans v. State, 17 Fla. 192.
[75] Hawthorne v. State, 6 Tex. App. 562; Swink v. State, 7 *Id.* 73.
[76] Cole v. State, 11 Tex. App. 67.
[77] State v. Cooper, 31 Kan. 505. S. P., in Louisiana, State v. Snow, 30 La. Ann. pt. I, 401.
[78] State v. Plowman, 28 Kan. 569. See also Stiff v. State, 21 Tex. App. 255.
[79] People v. Mott, 34 Mich. 80,
[80] People v. Henssler, 48 Mich

such terms as shall work him no injustice.[81]

In Nebraska, a magistrate has no right to alter an information, in any material part of it, without the consent of the person who made it. And, if made with his consent it should be re-verified before any further step is taken under it. Still, if such alteraltion be made, as in changing the value of property alleged to have been stolen so as to reduce the offense from grand to petty larceny, without a re-verification, and the accused go to trial without objecting, the judgment will be good, whether of acquittal or conviction.[82]

In New Hampshire, informations which are not found upon the oath of a jury, may be amended by the court, or by a single judge at chambers.[83]

In Texas, formal, but not substantial defects are amendable.[84] Thus a mistake in defendant's name may be corrected;[85] while an information which fails to charge an offense cannot be so amended as to make it charge one.[86] So also, in Kentucky, an additional charge cannot be added by amendment.[87]

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[81] State v. Kruel, 5 Mo. App. 589.
[82] Lewis v. State, 15 Neb. 89.
[83] State v. Weare, 38 N. H. 314.
[84] Brown v. State, 11 Tex. App. 451.
[85] Wilson v. State, 6 Tex. App. 154.
[86] Bates v. State, 12 Tex. App. 26.
[87] Com. v. Rhodes, 1 Dana (Ky.), 595.

MUNICIPAL CORPORATIONS — DEFECTIVE STREETS.

CHOPE V. CITY OF EUREKA.

Supreme Court of California, April 18, 1889.

A municipal corporation is not liable, in the absence of statutory provision, for personal injuries to one who fell into a sewer which was in process of construction, and was negligently left insufficiently guarded by the officers of the corporation. BEATTY, C. J., and WORKS, J., dissenting.

MCFARLAND, J., delivered the opinion of the court:

This is an action to recover damages for alleged personal injuries, caused by the plaintiff falling into an excavation for a sewer within the corporate limits of defendant, a municipal corporation. A general demurrer to the complaint was overruled, a motion for nonsuit was denied, and the jury found a verdict for plaintiff. The defendant appeals from the judgment, and from an order denying its motion for a new trial. The defendant was incorporated by a special charter in 1874. St. 1873-74, p. 91. Its legislative body is a common council, consisting of five members. The charter also provides for a marshal and certain other officers. The common council is given the powers enumerated in § 4408 of the Political Code, and also certain other special powers, but it is nowhere provided that the corporation shall be liable for injuries suffered by individuals through the neglect of the officers of the corporation to properly perform their duties. The facts upon which the judgment rests are these: The records of the proceedings of the common council, introduced in evidence, show the following, and no more: "In regard to certain alleyway nuisances, more particularly that of the sewer leading down the alley from the Western Hotel, and forming a cess-pool at the end of said alley-way, the matter was, on motion, left in the hands of the committee on streets; they to take prompt action thereon." After this the city marshal, for the purpose of removing said cess-pool nuisance, commenced the construction of a sewer; and the jury had, perhaps, the right to find from the evidence that in doing so he acted under the direction of one or more members of said committee on streets. The sewer, while in progress of construction, was left open, with a twelve-inch plank across it, and without the protection of guards or lights. On a dark night the plaintiff fell into the sewer and was hurt, and for the damages thus received he recovered the judgment. Without noticing any of the other points made by appellant, it is sufficient to say that it has long been the settled law of this State that a municipal corporation is not liable for personal injuries to individuals, such as that claimed to have been sustained by plaintiff, where there is no statutory provision declaring such liability. There is, no doubt, some conflict of decisions on the question in other States, although it is to be observed that in the New England and some other States there are statutory declarations of the liability. But in California the doctrine above stated has been clearly and continuously adopted, and, if any change in the law is desirable, that change must be made by the legislature. And so far, at least, the legislature has shown no disposition to make the change. Winbigler v. City of Los Angeles, 45 Cal. 36; Tranter v. City of Sacramento, 61 Cal. 275; Barnett v. Contra Costa Co., 67 Cal. 77, 7 Pac. Rep. 177; Crowell v. Sonoma Co., 25 Cal. 315; Huffman v. San Joaquin Co., 21 Cal. 430. The nonsuit, therefore, should have been granted, and the verdict and judgment were against the law and the evidence. Judgment and order reversed, and cause remanded.

We concur: Sharpstein, J.; Patterson, J.; Thornton, J.

WORKS, J., (*dissenting.*) I cannot concur in the conclusion reached, or the doctrine announced, in the foregoing opinion, that a city cannot be held liable for damages for injuries resulting under the circumstances of this case. The obstruction of

the street was the direct act of the city. The work being done, which resulted in such obstruction, was the work of the city, and not of a contractor. To deny all remedy, as against a city, under such circumstances, is, in many cases, a practical denial of justice. It may be that some of the cases cited in the prevailing opinion are broad enough to cover this case, and justify the conclusion reached, but if so they should, in my judgment, be modified. Most of the cases are for mere negligence of the corporation to keep public highways in repair, or perform some other duty devolving upon its officers. Huffman v. San Joaquin Co., 21 Cal. 427; Sherbourne v. Yuba. Co., 21 Cal. 113; Winbigler v. City of Los Angeles, 45 Cal. 36; Tranter v. City of Sacramento, 61 Cal. 271; Moore v. City of Los Angeles, 72 Cal. 287, 13 Pac. Rep. 855; Barnett v. Contra Costa Co., 67 Cal. 77, 7 Pac. Rep. 177. Whether these cases state the law correctly or not it is not necessary to determine. It is enough to say that they differ materially from the case under consideration. Two of the cases cited may be fairly construed as broad enough to cover this case. Crowell v. Sonoma Co., 25 Cal. 313; Howard v. San Francisco, 51 Cal. 52. But so construed they cannot, in my judgment, be supported either by reason or authority. Mr. Dillon, in his valuable work on Municipal Corporations, states the rule thus: "Where streets have been rendered unsafe by the direct act, order, or authority of the municipal corporation, (not acting through independent contractors, the effect of which will be considered presently,) no question has been made or can reasonably exist as to the liability of the corporation for injuries thus produced, where the person suffering them is without contributory fault, or was using due care. Even in those States in which a municipality is not held impliedly liable to a private action for neglecting to keep its streets in repair, it is yet held to be liable if it, or its officers under its authority, by positive acts, place obstructions on the streets or by such acts otherwise render them unsafe, whereby travelers are injured. Where the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its neglect or omission to keep the streets in repair, as well as for those caused by defects occasioned by the wrongful acts of others; but, as in such case the basis of the action is negligence, notice to the corporation of the defect which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability." 2 Dill. Mun. Corp. (3d Ed.) § 1024. I take this to be a correct statement of the law, and one that is supported by an overwhelming weight of authority. 1 Shear. & R. Neg. §§ 273, 288, 289, 291; Galveston v. Posnainsky, 62 Tex. 118; Barnes v. District of Columbia, 91 U. S. 541; Ehrgott v. New York, 96 N. Y. 264; Nelson v. Canisteo, 100 N. Y. 89, 2 N. E. Rep. 473; Thomp. Neg. 735, 736, notes; Maxmilian v. New York, 62 N. Y. 160; Harper v. City of Milwaukee, 30 Wis. 365, 372; Barton v. City of Syracuse, 36 N. Y. 54; Eastman v. Meredith, 36 N. H. 284, 294; City of Denver v. Rhodes, 9 Colo. 554, 562, 13 Pac. Rep. 729. Innumerable cases might be cited to the same effect, but to do so would unnecessarily extend this opinion. Many of them will be found cited in the text-books above referred to. For the reasons stated I am of the opinion that the judgment and order appealed from should be affirmed.

BEATTY, C. J. I concur in the foregoing opinion of Justice WORKS.

NOTE. — The authorities upon the point upon which this case turns are in unsolved confusion, and cannot be reconciled upon principle. Courts, recognized as able and learned, maintain the position held by the majority of the court in this case, while others, equally able and learned, support the position of the minority; and thus the law of the particular State of which the court is the creature is determined. The holding of the courts of most States is in accord with the California view, as declared by the majority of the court. The Supreme Court of the United States, and of the courts of last resort in New York and Illinois, hold the view of the judges in the minority in this case. Neither position, so far as I have been able to observe, in any State in the leading cases had the united support of the entire court, but the conclusion reached was by a majority of the judges. In the leading cases, determining the doctrine of the Supreme Court of the United States, reported in 91 U. S. 540 to 557, the opinions in the three cases, settling the doctrine of that court, were concurred in by four members and the chief justice, and dissented from by four members, a bare majority. The leading case, holding that no liability exists, in the absence of statutory declaration, the view, in my judgment, most in consonance with reason and principle, is the case of Hill v. Boston, 122 Mass. 344. In the opinion of the court, by Chief Justice Gray, nearly all the cases are reviewed and criticised.

In the year books, 5 Edw. IV, pl. 24, the common law doctrine is thus declared: "If there be a common way, and it is not repaired, so that I am damaged by the miring of my horse, I shall not have an action for that against those who ought to repair the way, but it is a popular action, in which no individual shall have an action on the case, but it is an action by way of presentment," and the reason that case was not maintainable is because the way ought to be repaired by the police.[1]

So far as counties, *quasi* corporations, are concerned, this rule is still maintained almost without exception.[2] Its application, while acting as the agency of the State, to cities, and not merely in matters strictly municipal, has not been so generally accepted, but is the general rule still.[3] The difficulty seems to arise from a disagreement as to what is a mere corporate or municipal function, and not the act of the city as the arm of the State; and this must be de-

[1] Russell v. Men of Devono, 2 T. R. 667; Bartlett v. Crozier, 17 Johns. 339; West v. Lockport, 16 N. Y. 161 and note.

[2] Dillon on Munic. Corp. (3d ed.) §§ 997, 1014; Hill v. Boston, 122 Mass. 344; People v. Auditors, 75 N. Y. 317.

[3] Novasota v. Pearce, 46 Tex. 525; Detroit v. Blackeby, 21 Mich. 84; Hill v. Boston, 122 Mass. 344.

termined by a fair view of the charter.[4] Municipal corporations have what have been denominated public rights and private rights, public and private duties.[5] Those things which it does in its private capacity, as the maintenance of gas and water-works, or a sewer system, which are in the nature of special privileges, not enjoyed by the public generally, and not such as further the ends of the State, are referrable to this character of the city; and the rights growing out of them are taken just as any other person, natural or artificial, would take them, subject to liability for negligent use.[6]

Those acts which a municipality does as the agency of the State, in the absence of statutes declaring liability, though done negligently, to the damage of a private person, afford no cause of action to the person injured. It is the State, acting through its local agent. No wrong can be attributed to the State. It is a public wrong, for which the State has provided a remedy, by punishment of the unfaithful officer.[7]

Legislative enactment is necessary to impose additional liabilities, the intention to do which must be clearly manifested.[8]

In the case of Barnes v. District of Columbia,[9] the acts of congress were given considerable importance, and under the construction given by the court the liability for the breach is placed upon a duty "peculiarly municipal." Considered in the light of the expression "peculiarly municipal," the case does not appear to be so greatly at variance with other authorities, declaring the generally accepted authority. Mere acceptance of a municipal charter is not considered as conferring such a benefit as will render a corporation liable to a private action for neglect of duties thereby imposed, when we consider that the purpose of the creation of such corporations is to exercise a part of the powers of the State, duties imposed upon all cities of the commonwealth as representatives of the public, create only a public duties, and will not support an action by an individual, though he sustain special damages.[10]

Judge Dillon, in his work on Municipal Corporations, places the ground of liability, in the absence of statutory declaration upon an implied liability, but the cases cited by him do not seem to recognize such doctrine. In each case the corporation was held liable, without mention of any such ground.[11] He admits in a later section that the implied liability cannot be well sustained without a special charter. And while Mr. Justice Hunt is quoted as saying that the law of the country must be deemed settled, four justices dissent from the opinion of the learned justice in the case in which he used the language.[12] The last case cited, and the case of Hill v. Boston, contain citations of all the leading cases in the various States.

[4] Dillon on Munic. Corp. (3d ed.) § 1017.

[5] *Id.* § 26; People v. Detroit, 15 Am. Rep. 202.

[6] Pittsburg v. Grier, 22 Pa. St. 384; Philadelphia, etc. R. Co. v. Davis (Md.), 10 Cent. Rep. 553; Hitchins v. Frostberg, 11 Atl. Rep. 826; Evanston v. Gunn, 99 U. S. 660; Johnston v. Dist. Col., 118 U. S. 19; Manchester v. Erricson, 105 U. S. 347; Hannon v. St. Louis Co., 67 Mo. 313; Detroit v. Corey, 9 Mich. 165; Bailey v. Mayor, 3 Hill, 531; Storrs v. Utica, 17 N. Y. 104; Jones v. New Haven, 34 Conn. 1, and cases cited; W. S. F. Society v. Philadelphia, 31 Pa. St. 185.

[7] Hill v. Boston, 122 Mass. 344; Detroit v. Corey, 9 Mich. 165.

[8] Hill v. Boston, 122 Mass. p. 361.

[9] 91 U. S. 540.

[10] Hill v. Boston, *supra*.

[11] § 1014, and cases cited in note 1.

[12] Dillon on Munic. Corp. § 1023; Barnes v. Dist. Col., 91 U. S. 550.

INTERSTATE COMMERCE ACT.

CRIMINAL PROSECUTION.

The case of the United States against Tozer, which was tried before Judge Thayer of the United States District Court at Hannibal, Mo., a few days ago, will attract national attention on account of the fact that it is the first trial had under the criminal section of the Interstate Commerce Law. The defendant, who was an agent of the Missouri Pac. Ry. Co., was prosecuted upon a number of counts of an indictment charging him as agent of the railroad company with unjust discrimination in the charging of rates of freight from Hannibal to Hepler, Kansas. It appears that in 1887 a certain firm in Hannibal shipped to Hepler, Kansas, by way of the Mo. Pac. Ry. Co., one barrel of sugar on which they paid the local freight rate of forty cents per 100 pounds. About the same time the same firm shipped two barrels of sugar from Chicago to Hepler by way of Hannibal, the proportion allowed the Mo. Pac. Ry. Co. from Hannibal to Hepler, by the C., B. & Q. Ry., who contracted for the entire journey, was thirty-four cents per 100 pounds, or twelve cents less than the firm paid for transportation of the first barrel the same distance. The defendant was convicted upon two counts of the indictment. The charge of the court is interesting, but we have space only for that portion pertaining to counts two and three upon which defendant was convicted. The United States was represented by Geo. D. Reynolds, U. S. Attorney; T. P. Bashaw and Chas. Claflin Allen, of counsel.

Judge Thayer charged:

"Section three of the Interstate Commerce Act is as follows: 'It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any * * * person, company, firm or corporation on any * * * description of traffic in any respect whatever; or to subject any * * * person, firm, company or corporation * * * to any undue or unreasonable prejudice or disadvantage in any respect whatever.'

The second and third counts of the indictment are framed under the third section, the second count charging in substance that defendant gave the Chicago, Burlington & Quincy Railroad an undue and unreasonable preference and advantage over the Hayward Grocery Company in rates on sugar, and the third count charging that he subjected the Hayward Grocery Company to an undue and unreasonable prejudice by giving the Chicago, Burlington & Quincy Railroad a lower rate on sugar than was given the Hayward Grocery Company.

In arriving at a verdict on the second and third counts, you will have to consider and determine the same questions among others that arise under the first count—that is to say:

1st. Was defendant an agent of the Missouri Pacific Railway Company?

2d. Did he charge the Hayward Grocery Company forty-six cents per 100 pounds for transporting sugar from Hannibal to Hepler, Kansas?

3d. Did he charge the Chicago, Burlington & Quincy Railroad Company only thirty-four cents per 100 pounds for transporting sugar from Hannibal, Missouri, to Hepler, Kansas; and

4th. Was the service rendered the Chicago, Burlington & Quincy Railroad a like and contemporaneous service to that rendered the Hayward Grocery Company, and was it rendered in the transportation of a like kind of traffic under 'circumstances and condi-

tions' substantially similar to those attending the service rendered the Hayward Grocery Company?

The second count of the indictment charges that the defendant gave the Chicago, Burlington & Quincy Railroad an undue and unreasonable preference; and the third count charges that he subjected the Hayward Grocery Company to an undue and unreasonable prejudice and disadvantage; but the court holds and so instructs you that if the defendant charged the Hayward Grocery Company a greater rate than it charged the Chicago, Burlington & Quincy Railroad for a 'like contemporaneous service' done under 'substantially similar circumstances and conditions,' then such act was within the meaning of the law both an undue and unreasonable preference, and advantage given to the Chicago, Burlington & Quincy Railroad, and an undue and unreasonable prejudice or disadvantage to which the Hayward Grocery Company was subjected.

Therefore, if you find in the affirmative on all four of the questions that I have proposed and before stated, you must return a verdict of guilty on the second and third counts as well as on the first count.

Now, gentlemen, I presume you will have no difficulty in answering the first three of the questions as they are simple questions of fact.

The fourth proposition is more difficult because it involves the inquiry as to what is meant by the statute when it speaks of 'a like and contemporaneous service in the transportation of traffic under substantially similar circumstances and conditions.'

It is impossible for me to explain that phrase in a manner that will fit all cases, hence, I shall not attempt it.

I will take the precise case that you have to decide, and, in view of the facts testified to, give you a few directions with respect to the clause in question.

In the first place the service rendered to the Hayward Grocery Company on June 17, 1887, was contemporaneous with that rendered to the Chicago, Burlington & Quincy Railroad on June 15, 1887, within the meaning of the law.

In the second place the service so rendered for the Hayward Grocery Company was like that alleged to have been rendered to the Chicago, Burlington & Quincy Railroad within the meaning of the law, because the same kind of property was carried for each party for the same distance over the same route.

The next question is, was the service in both cases rendered under substantially similar circumstances and conditions? This is the vital point.

The defendant says the circumstances and conditions were substantially dissimilar because the Chicago, Burlington & Quincy Railroad Company furnished more traffic, or if not more traffic, nearly as much traffic to the Missouri Pacific Railway Company as the Hayward Grocery Company and all other Hannibal shippers combined.

Well, suppose that to be the fact. It did not, under the law, render the service to the Chicago, Burlington & Quincy Railroad, a service rendered under substantially dissimilar circumstances and conditions to that rendered for the grocery company, within the meaning of the Interstate Commerce Law, and did not justify a difference in rate.

The fact that one man is a large shipper and another a small shipper does not entitle the carrier to make a difference in the rate, if the property carried in each case is of the same class, and the distance and route is the same.

Defendant next says the circumstances and conditions of the two alleged shipments were substantially dissimilar, because one shipment originated at Hannibal and the other at Chicago, and that in the case of the two barrels of sugar the property was being carried through from Chicago to Hepler, on a through rate of fifty-one cents per 100 pounds, agreed upon by and between the Missouri Pacific Railway Company on the one hand and the Chicago, Barlington & Quincy Railroad Company on the other.

This presents a different question, and on this point I instruct you as follows:

If you believe and find from all the evidence in the case that the lines of railroad of the Chicago, Burlington & Quincy Railroad Company and of the Missouri Pacific Railway Company form a continuous line of railroad from Chicago, Illinois, to Hepler, Kansas, passing through Hannibal, Missouri, it being an intermediate shipping point, and that the two roads connect at Hannibal and interchange traffic at that point; and if you find that prior to June 15, 1887, the Chicago, Burlington & Quincy and Missouri Pacific Railway Company had agreed upon and established a through rate from Chicago to Hepler on all property shipped from Chicago to Hepler via Hannibal over such continuous line, and that such established through rate on sugar was fifty-one cents per 100 pounds from Chicago to Hepler; and if you find that the two barrels of sugar on which defendant is alleged to have charged the Chicago, Burlington & Quincy Railroad at the rate of thirty-four cents per 100 pounds for the transportation thereof from Hannibal to Hepler, was sugar that was received by the Chicago, Burlington & Quincy Railroad Company at Chicago to be carried over such continuous line to Hepler for said agreed and established rate of fifty-one cents per cwt.; and that the Chicago, Burlington & Quincy Railroad Company on receipt of said two barrels of sugar, issued to the shipper thereof the bill of lading for two barrels of sugar that has been read in evidence, then the court instructs you that the charge for transportation on said two barrels of sugar from Hannibal to Hepler, alleged to have been made by defendant, was not a charge for a service rendered the Chicago, Burlington & Quincy Railroad Company under circumstances and conditions substantially similar to the circumstances and conditions attending the service rendered the Hayward Grocery Company, within the meaning of the Interstate Commerce Act, and you should find the defendant not guilty of the charge laid in the first count of the indictment.

Now, gentlemen, in the event that you find under the last instruction that the services rendered the Chicago, Burlington & Quincy Railroad Company and the Hayward Grocery Company were not rendered under similar circumstances and conditions and accordingly acquit under the first count, then a further question arises under the second and third counts which you must consider and determine.

Under the third section of the act it is made an offense to give one person undue and unreasonable preference or advantage, or to subject a person to an undue and unreasonable prejudice or disadvantage.

As before remarked, the second and third counts are under these sections.

It is shown by the testimony that the Missouri Pacific Railway Company's proportion of the alleged through rate from Chicago to Hepler on sugar as thirty-four cents per 100 pounds, and that its local rate on sugar from Hannibal to Hepler is forty-six cents per 100 pounds.

Now, conceding that some difference between the local rate and the Missouri Pacific Railway Company's proportion of the through rate is permissible, owing to the different conditions affecting the two shipments, the question that I submit to you under the

second and third counts, is whether the difference shown in this case between the two rates of twelve cents per 100 pounds is, under all the circumstances of the case, a reasonable difference or an undue and unreasonable difference not justified by the different circumstances under which through shipments from Chicago and local shipments from Hannibal are made.

If you find that the difference in rate of twelve cents per 100 pounds is an undue and unreasonable difference, and, as before explained, that defendant as agent of the Missouri Pacific Railway Company knowingly and willfully gave the Chicago, Burlington & Quincy Railroad the advantage of such difference in the shipment of the two barrels of sugar mentioned in the indictment—then you may return a verdict of guilty on the second and third counts although you acquit on the first count.

If, on the other hand, you find that the difference in the rate now in question is neither undue or unreasonable considering all the circumstances and conditions affecting local as compared with through shipments, you will render a verdict of acquittal on the second and third counts.

In determining the last question submitted to you as to the reasonableness or unreasonableness of the difference between the local rate and the Missouri Pacific Railway Company's proportion of the through rate, I give you full liberty to consider all the facts, circumstances and reasons adduced by the various witnesses in justification of the difference shown, and I ask you to consider the same carefully and fairly without any prejudice or bias whatsoever.

RECENT PUBLICATIONS.

THE LAW OF AGENCY, Including Special Chapters on Attorneys, Auctioneers, Brokers and Factors. By Floyd R. Mechem. Chicago: Callaghan & Co. 1889.

This is, we believe, the first effort as a book writer on the part of the author of this work, though he has long been favorably known by essays which have appeared from time to time in various law magazines. He has contributed to this JOURNAL, some of the results of his pen and we feel sure our subscribers will uphold us in declaring his work as thorough and satisfactory, and his style clear and terse.

This book pretends, and seems to be, a complete treatise on the law of agency, including special chapters on attorneys, auctioneers, brokers and factors. It contains something over nine hundred pages and cites nearly seven thousand cases. It is undoubtedly the most complete work on the subject of agency yet published, though we are inclined to think it is not as philosophical a discussion of the subject as may be found in other treatises. There is one feature of the book which we think will meet with especial approval and satisfaction, and that is a logical and clear division of the general subject into sub-heads and chapters. Mr. Mechem's success in this regard is all the more to be commended because the subject is one, which extending through all departments of the law, has no well defined boundary lines, and renders the making of them more or less difficult. The subjects of Ratification of Agency and of Delegation of Authority are most exhaustively considered. But we have found the chapters on the Duties and Liabilities of the Agent to his Principal, of the Agent to Third Persons, of the Principal to the Agent, of the Principal to Third Persons, of Third Persons to the Agent and of Third Persons to the Principal, the more interesting and valuable, for within those chapters is emphatically the substance of the law of agency, many questions erroneously classed under that head and discussed at length by the author in other chapters, properly belonging to treatises on Contract and Evidence.

The arrangement of the book and its mechanical execution are in every way praiseworthy. The index is carefully prepared, and, taken all in all, we feel no hesitation in commending it to the profession.

QUERIES AND ANSWERS.

QUERY NO. 23.

A died testate, leaving a wife B and two adult children, C and D. In the will the testator left a life estate to B in certain real estate, with the remainder to the infant children of C, also a life estate to D in certain real estate, with the remainder to the said infant children. Other real estate was left in fee-simple to C. All the real property was thus disposed of. The personal property left was not sufficient to pay debts. B, the wife, renounces the will, "and thereupon she shall be entitled to such part of his estate (the husband), real and personal, as she would have been entitled to if he had died intestate," which, in this case, would be one-third. All parties are willing for the widow to take her one-third interest, in money value, and for the will, in other respects to be carried out. How can this be done without prejudice? What effect will the renunciation of the will, by the widow, have upon the interests of the life tenant D and the remainderman? What will be the effect upon the fee-simple estate of C.

W. C.

HUMORS OF THE LAW.

"I'll tell you a story, boys," said Col. Ingersoll, while waiting for the Kerr jury to come in on Friday afternoon.

"During the good old days in California," continued the colonel, "it was the law that the holder of a claim should be liable to lose it if he let it remain idle for ten days in succession. Well, there was one fellow who had been working faithfully, when he was taken sick and had to take to his tent. Another fellow came along and jumped his claim. The first man pleaded and argued, but the other was not to be moved. So when the first man recovered he sued the interloper.

"The case came up before the justice. He was very sorry, he told the plaintiff, but the law was absolute on the question, and the defendant could not be ousted. No sooner had he finished than the plaintiff jumped up and hit the defendant a stinging blow behind the ear. The defendant fell over, and the plaintiff jumped on him and began to pummel him soundly. The constable ran up and was trying to part the fighters, when the judge arose, and pounding on the desk, yelled to the constable:

"'—— —— you, sir, leave them alone! The law is the law, but if the gentlemen want to compromise they mustn't be interfered with!'"

"WELL," said an Irish attorney, "if it plaze the court, if I am wrong in this I have another point that is equally conclusive."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ARBITRATION AND AWARD. —— Where it is agreed to submit a controversy "to some disinterested third party," and two arbitrators are selected, one of whom is interested, by being a stockholder of one of the parties, their award is void, unless the party seeking to sustain it shows that the adverse party had knowledge of such interest before the award was signed, and either waived the objection or acquiesced in the arbitrators' continuing to act.—*B. & O. Ry. Co. v. Canton Co.*, Md., 17 Atl. Rep. 394.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS.——Code Ala. § 1879, and 1883, do not authorize judgment creditors to redeem land which has passed under a general assignment by the judgment debtor for benefit of creditors, including such judgment creditors, and has been sold by the assignee.—*Comer v. Constantine*, Ala., 5 South. Rep. 773.

3. ATTACHMENT.—— In an action to recover the possession of specific personal property, the court, or judge in vacation, may, for good cause shown before judgment, compel the delivery of the property to the officer, or party entitled thereto, by attachment, and may examine the defendant as to the possession or control of the property.— *In re Farr*, Kan., 21 Pac. Rep. 273.

4. ATTACHMENT — Unliquidated Damages. —— In an action for the breach of contract to sell goods on commission, in refusing to allow plaintiff to carry out the contract, requiring an affidavit for an attachment to state the amount of the demand due plaintiff, an attachment was not authorized; such contract not affording any certain standard by which the amount of damages could be ascertained. — *Hochstadder v. Sam*, Tex., 11 S. W. Rep. 408.

5. ATTACHMENT.——Upon the issue as to whether the transfer of the property attached to the claimants was made by the debtor with fraudulent intent, it was competent for the plaintiff to show that on the day following such transfer the debtor conveyed other property with the fraudulent intent of defeating her creditors.—*Bernheim v. Dibrell*, Miss., 5 South. Rep. 698.

6. ATTORNEY AND CLIENT.—— An attorney may testify in behalf of his client, and the fact that his compensation as an attorney in the action is contingent on the result of the litigation does not render him incompetent as a witness. The interest he may have in the action goes to his credibility, but not to his competency.—*Cent. Branch U. P. Ry. Co. v. Andrews*, Kan., 21 Pac. Rep. 276.

7. ATTORNEY AND CLIENT—Embezzlement.——An attorney who collects money for a client acts as the agent as well as attorney, and may be convicted of embezzlement for appropriating the money to his own use with intent to deprive the owner.—*People v. Converse*, 42 N. W. Rep. 70.

8. ATTORNEY AND CLIENT—Disbarment.——An attorney who, after having been employed by one party to a litigation, and having ceased to be thus employed, seeks employment by the adverse party, offering to impart to the latter important information, is guilty of such a breach of trust as requires his disbarment. — *United States v. Costen*, U. S. C. C. (Colo.), 38 Fed. Rep. 23.

9. BANKS AND BANKING.——Where a bank delivers to another bank money and securities to pay a creditor, and the account is kept in the name of the depositing bank or its owner absolutely, and not as trustee for the creditor, the bank making the deposit may withdraw it at any time before the creditor has notice of the transaction. — *Brockmeyer v. Washington Nat. Bank*, Kan., 21 Pac. Rep. 300.

10. CARRIERS—Negligence. —— Where a passenger is injured by the concurrent negligence of the carrier an a third person, the negligence of the carrier is not imputable to the passenger, so as to bar the right of the latter to recover of the third person. — *New York, P. & N. R. Co. v. Cooper's Admr.*, Va., 9 S. E. Rep. 331.

11. CONSTITUTIONAL LAW. —— The act entitled "An act fixing the time for the opening and closing of saloons and gaming-houses" is not repugnant to the constitutional provision that each act "shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title.—*Ex parte Livingston*, Nev., 21 Pac. Rep. 322.

12. CONTRACTS — Restraint of Trade. —— Plaintiff agreed to furnish for the defendant everything necessary to run a barber-shop, and the latter agreed not to do any work as a barber for any one else, or to open a shop for himself in such town at any time. The proceeds of the business were to be equally divided between them: *Held*, that the stipulation of the defendant was in restraint of trade and void. — *Carroll v. Giles*, S. Car., 9 S. E. Rep. 422.

13. CONTRACT — Counterclaim. —— Plaintiff having failed to establish the contract declared on, defendants cannot recoup their damages for breach of the contract actually made and alleged in their answer. There can be a recoupment only on the contract, sued on.— *Holderman v. Berry*, Mich., 42 N. W. Rep. 57.

14. CORPORATIONS—Forfeiture. —— Where the legislature has declared that, if the holders of a franchise to collect tolls for the navigation of an artificial channel shall permit the channel to become so obstructed as to impede navigation, "the collection of tolls by them shall be suspended until all obstructions shall be removed" amounts to a waiver of the right to have a forfeiture of the franchise declared for such cause. — *State v. Morris*, Tex., 11 S. W. Rep. 392.

15. COURTS—Judge.——Under statutes disqualifying a judge in a criminal case if he has been counsel for the State or the accused, a judge is not disqualified from the mere fact that he was district attorney at the the time when the accused was tried before an examining court in his district. — *Wilks v. State*, Tex., 11 S. W. Rep. 415.

16. COURTS — Jurisdiction. —— The courts of New

Mexico have no jurisdiction, in passing upon the validity of an action to the territorial legislature, to review the action of that body in respect to its organization, or the election and qualifications of its members.— *Chavez v. Luna*, N. Mex., 21 Pac. Rep. 344.

17. COVENANTS—Damages.—— In an action against a remote warrantor to recover damages for the failure of title to certain lots, where it appears that such lots constituted a part of a large tract of land which had been conveyed by the defendant for a single consideration, and the title to the whole tract had failed, the damages recoverable by the plaintiff cannot exceed the proportion of the consideration received by the remote vendor which the value of the lots conveyed to the plaintiff bears to the value of the entire tract conveyed by the defendant. — *Witzman v. Hirsh*, Tenn., 11 S. W. Rep. 421.

18. CRIMINAL LAW—Appeal.—— Where, after conviction, in a criminal case, defendants appeal, but give no appeal-bond, or file no affidavit of their inability to give such bond, or to deposit money sufficient to cover the probable costs, as provided by Code Miss. § 2335, when a stay of judgment is desired, the appeal should be dismissed.—*Lum v. State*, Miss., 5 South. Rep. 689.

19 CRIMINAL LAW—Homicide. —— It is lawful for an officer to kill a fleeing felon where he cannot otherwise be taken and the necessity for such killing is a fact for the jury to determine. — *Jackson v. State*, Miss., 5 South. Rep. 690.

20. CRIMINAL LAW—Character. ——In all cases where a man is on trial, accused of crime, he has the right to introduce evidence to show his general good character or reputation, but the evidence is to be confined to general reputation, and particular acts of good conduct on the part of the accused cannot be shown in evidence, and the same rule applies to the prosecution. —*Reddick v. State*, Fla., 5 South. Rep. 704.

21. CRIMINAL LAW—Homidide.—— On a murder trial, defendant having shot deceased with a gun, after fighting and abusive language by both, an instruction that if deceased used the most grievous words of reproach, aggravated with the most provoking circumstances, and upon such provication defendant killed him with a deadly weapon, it was murder in the first degree, is error. — *Watson v. Commonwealth*, Va., 9 S. E. Rep. 418.

22. CRIMINAL LAW — Obscene Language. —— Under Code Ala. § 4031, making it a crime to use obscene language in the presence of a female, it is proper to show, that the woman in whose presence such language was used was in the habit of using similar language in defendant's presence, but not that she had the reputation of using such language generally. —*Golson v. State*, Ala., 5 South. Rep. 799.

23. CRIMINAL LAW—Larceny. —— The laws Cherokee Nation prescribe punishment for every person stealing a horse. Under the United States laws, a white person cannot be punished under such law Pen. Code Tex. arts. 708, 709, prescribe a punishment for theft and bringing the stolen goods into the State, but require that the theft must also have been a theft under the laws of the State or territory from which the goods were brought: *Held*, that one may be convicted in Texas, though he were a white person and took the property from the Cherokee Nation.— *Clark v. State*, Tex., 11 S. W. Rep. 374.

24. CRIMINAL LAW—Stolen Goods.——In a prosecution under Code Ala. § 3794, an indictment is insufficient which fails to allege the "intent not to restore the property," though it is alleged that the defendant "feloniously" bought, etc., property, knowing it to have been stolen.—*Holt v. State*, Ala., 5 South. Rep. 793.

25. CRIMINAL LAW—Arson. —— Construction of Code Ala. 1886, § 3780, providing that any person who willfully sets fire to "any prison or jail, or any other house or building which is occupied by a person lodged therein, or any inhabited dwelling house," etc., is guilty of arson in the first degree.—*Childress v. State*, Ala., 5 South. Rep. 775.

26. CRIMINAL LAW— Embezzlement. —— It appeared that defendant had deposited the certificate of stock issued to him but which he had pledged to the corporation for part of its value with a bank as security for his individual note, but there was no evidence that he claimed to be the absolute owner of the certificate, or tried to pledge the corporation's interest therein: *Held*, under Rev. St. Wis. § 1751, that it would not be presumed that he attempted to pledge more that his own interest, and a conviction could not be sustained. — *State v. Williamson*, Wis., 42 N. W. Rep. 111.

27. CRIMINAL LAW — Former Jeopardy. —— Under Crim. Laws Mont. one convicted under an indictment for larceny has not been in jeopardy for the crime of burglary, as larceny is the felonious taking of goods with intent to deprive the owner, and to convert them. —*Territory v. Willard*, Mont. 21 Pac. Rep. 301.

28. CRIMINAL LAW—Bastardy. —— A prosecution under the act providing for the maintenance and support of illegitimate children is not local, but may be brought in any county or before any justice of the peace of the State.—*In re Lee*, Kan., 21 Pac. Rep. 282.

29. CURTESY.——Under Rev. St. Wis. 1858, ch. 95, providing that real estate conveyed to a wife becomes her sole and separate property, which she can control as if unmarried, a husband has no curtesy, on his wife's death, in lands conveyed to her during coverture, expressed in the conveyance to be "to her sole and separate use.—*Haight v. Hall*, Wis., 42 N. W. Rep. 109.

30. DEDICATION —Estoppel.——*Held*, under the facts that plaintiff was estopped by his silence to deny his dedication of the land, and that the condition attached to the gift, if any, was waived.—*Forney v. Calhoun County*, Ala., 5 South. Rep. 750.

31. DEED—Destruction.—— Where the grantor in an unregistered deeds regains possession of it after delivery, and wrongfully destroys it, the grantee's title is not thereby divested, and his remedy is to compel a re-execution.—*Edwards v. Dickenson*, N. Car., 9 S. E. Rep. 456.

32. DEED— Fraud. —— In an action to cancel a deed alleged to have been procured by false and fraudulent representations, it is error to charge, on an issue submitted to a jury, that the jury must be "satisfied beyond all reasonable question" that such representations were made to induce the execution of the deed. Satisfactory proof is all that is required.—*Harding v. Long*, N. Car., 9 S. E. Rep. 445.

33. DEED—Cancellation.—— Where by the misrepresentations of third persons plaintiff is made to believe that her deed to defendant is for a smaller quantity of land than it in fact conveys, and defendant is ignorant of the deception and acts in good faith, plaintiff is entitled to have the deed cancelled on the ground that there was no mutual assent. — *De Perry v. De Everett*, Tex., 11 S. W. Rep. 388.

34. DESCENT AND DISTRIBUTION— Negroes.——Act N. C. Feb. 1879, declaring that "the children of colored parents," born before January 1, 1868, of persons living together as husband and wife, are legitimate children of such parents, with all the rights of heirs and next of kin, applies to the children of colored parents, whether slaves or free, and whether the parents were incapable of entering into the marriage relation by virtue of positive law or their *status* as slaves.—*Woodward v. Blue*, N. Car., 9 S. E. Rep. 492.

35. DIVORCE—Alimony. —— Under § 22, ch. 25, Comp. St. a district court, or this court, upon appellate proceedings in the same case, may, after a divorce is granted at the suit of the husband, make a decree for alimony in favor of the wife out of the property, even though the decree of divorce be against the wife for any of the enumerated causes, except the adultery of the wife.—*Dickerson v. Dickerson*, Neb., 42 N. W. Rep. 9.

36. DOWER. —— In a petition filed by a widow in the probate court to have dower in the lands of which her husband died seised assigned to her, the failure to allege in such petition that her right to dower "is not

disputed by the heirs or devisees" is not fatal.—*Serry v. Curry*, Neb. 42 N. W. Rep. 97.

37. EASEMENTS.—— Where by a change in the uses o a dominant tenement the enjoyment of an easement of passage to it has become exceedingly oppressive to the owner of the servient estate, and a right of way from necessity does not exist, if the owner of the servient estate obstruct the easement, equity will not interfere, but will leave complainants to their remedy at law. — *McBryde v. Sayre*, Ala., 5 South. Rep. 791.

38. EASEMENTS — Drainage. —— The easement of a ditch for drainage purposes over the pasture land of another does not impose upon the owner of the servient estate any liability for damage done to the ditch by his cattle in crossing over it, and in caving in its sides while feeding near it. — *Dugfee v. Garvey*, Cal., 21 Pac. Rep, 302.

39. EJECTMENT. —— Where plaintiff is not, and defendant is, in possession of land claimed by the former, the proper form of remedy is ejectment.—*Corporation v. Gibbon*, Wash. Ter., 21 Pac. Rep. 315.

40. ELECTIONS AND VOTERS.——Ballots not conforming to the requirements, as to the paper used, should be counted, as the language of the statute only makes it illegal to print or distribute such ballots, and not to vote them, and that construction should be adopted which is most favorable to the validity of an attempted exercise of the elective franchise.— *Kellog v. Hickman*, Colo., 21 Pac. Rep. 325.

41. EMINENT DOMAIN.——In ascertaining the amount of damages to be awarded to the owner of a farm, part of which is taken for a railroad, the tendency to frighten teams, employed on the farm, by the running of trains, etc., is not too remote to be taken into consideration.— *Fayetteville & Little Rock Ry. Co. v. Combs*, Ark., 11 S. W. Rep. 418.

42. EMINENT DOMAIN. —— In a proceeding by a railroad company to condemn land for a right of way, the assessment of damages is not necessarily restricted to the injury done to the particular tract described in the petition.— *Fayetteville & Little Rock Ry. Co. v. Hunt*, Ark., 11 S. W. Rep. 418.

43. EMINENT DOMAIN. —— The fact that a court refused to enjoin a railroad company from taking possession of land for its railroad before condemnation and payment of compensation did not legalize the possession so taken, or relieve the company from an action at law for the wrongful entry. — *Grand Rapids, L & D. R. Co. v. Chesebro*, Mich., 42 N. W. Rep. 66.

44. EQUITY — Jurisdiction. —— Where a petition is filed in equity by the executrix of an estate, alleging that certain debts are owing by the estate, and that it is necessary to sell land belonging to it to pay such debts, and any part of the indebtedness alleged in the petition is found to be due by the estate, the chancellor has jurisdiction to order a sale of a part of the property to pay such indebtedness.— *McGowan v. Lufburrow*, Ga., 9 S. E. Rep. 427.

45. EQUITY—Jurisdiction. —— An action upon a contract by which plaintiff delivered to defendant's intestate a number of sheep, to receive in return, at the expiration of a fixed period, a quantity of wool and an equal number of sheep, is not of an equitable nature, though the accounts between the parties have been carelessly kept.—*Lewis v. Baca*, N. Mex., 21 Pac. Rep. 343.

46. EXECUTION — Redemption. —— Where a debtor whose land has been sold on execution surrenders possession to the purchaser and afterwards offers to redeem in compliance with the Code the purchasers or those claiming under him cannot interpose a bill to redeem title derived after the sale from any source. — *Aycock v. Adler*, Ala., 5 South. Rep. 794.

47. EXECUTION — Lien. —— A claimant of personal property levied on under execution on foreclosure of a laborer's lien is not concerned as to the regularity or validity of the foreclosure proceedings, and cannot move to have them dismissed.—*Dixon v. Williams*, Ga., 9 S. E. Rep. 468.

48. EXECUTION — Partnership. —— A purchaser at a sale upon an execution against one partner, levied upon his interest in partnership property, does not acquire any title to or right of possession of the property. These still remain in the partnership. — *Lane v. Lespest*, 42 N. W. Rep. 84.

49. EXECUTORS AND ADMINISTRATORS. —— The staleness of a demand attacking ancient settlements, made after the lapse of twenty years, and only after the death of the party charged, and excused by no proof of ignorance or concealment, imposes upon the attacking party the necessity of making clear and unequivocal proof.— *Succession of Bobb*, La., 5 South. Rep. 757.

50. EXECUTORS AND ADMINISTRATORS. ——A contract by which the administrator, who is also a legatee of the estate, conveys to a firm of attorneys one-half of the assets of the estate, after the settlement of all the claims against it, upon condition of the professional services, etc., of said attorneys rendered in the settlement of the estates, is not illegal because of the attempt to bind the minors' interest, it being only invalid as to them.— *McCampbell v. Durst*, Tex., 11 S. W. Rep. 380.

51. FRAUDS— Statute of. —— Sheet of paper written disconnectedly on both sides: *Held*, sufficient memorandum under the statute for sale of land. — *Gordon v. Avery*, N. Car., 9 S. E. Rep. 486.

52. FRAUDS— Statute of. —— It being impossible to determine from the telegrams claimed to constitute a contract for sale of land, just what property was intended to be included in the proposition and acceptance, the contract was void under the statute of frauds. —*Breckinridge v. Crocker*, Cal., 21 Pac. Rep. 179.

53. FRAUDULENT CONVEYANCE. —— The Rhode Island statute, rendering void conveyances made with the intent "to delay, hinder, or defraud creditors of their just and lawful actions, debts, suits, accounts, damages, or just demands of what nature soever," extends to a claimant for damages for seduction, especially where the claimant has recovered a judgment. — *McKenna v. Crowley*, R. I., 17 Atl. Rep. 354.

54. FRAUDULENT CONVEYANCE. —— Where insolvent debtors made conveyances of real estate to creditors, for the purpose of securing a *bona fide* indebtedness, and the creditors withheld the conveyances from record, with an honest belief that their indebtedness would be paid, and without any agreement or understanding with the debtors, such conveyances are not fraudulent as to the other creditors, because they were not recorded. — *First Nat. Bank v. Jaffray*, Kan., 21 Pac. Rep. 242.

55. FRAUDULENT CONVEYANCE. —— Under the California insolvent act of 1880, where a debtor transfers property out of the usual and ordinary course of business it is *prima facie* evidence that the assignee had reasonable cause to believe that the transfer was made by the debtor with a view to prevent his property from being distributed ratably among his creditors. — *Washburn v. Huntington*, Cal., 21 Pac. Rep. 305.

56. GAMING. —— *Held*, that a game called "craps," which can be played on any flat surface, and without the intervention of any third party, is not a game to be "played, dealt, kept, or exhibited," within the meaning of the statute.—*Choppell v. State*, Tex., 11 S. W. Rep. 411.

57. GARNISHMENT.—— Non-residents of the State are entitled to the benefit of Const. Tex. art. 16, § 28, and Rev. St. Tex. art. 218, providing that no current wages for personal service shall ever be subject to garnishment. — *Bell v. Indian Live Stock Co.*, Tex., 11 S. W. Rep. 344.

58. HIGHWAYS.——The benefits received by a person whose land is taken for a public road are a part of the consideration for the release or condemnation of the land; and such benefits are as much his property as the land itself, and the State cannot deprive him of them, by subsequently discontinuing the road. — *Pearsall v. Board*, Mich., 42 N. W. Rep. 77.

59. HIGHWAYS—Defects.——Notice held not sufficiently accurate to comply with the statute requiring notice

of an accident for which damages are claimed against a town for injuries.—*Weber v. Town of Greenfield*, Wis., 42 N. W. Rep. 101.

60. HOMESTEAD—Conveyance.——A land-owner who is not in debt may, by deed absolute or by mortgage, convey his land that has never been allotted to him as a homestead, without the joinder of his wife in the deed, free from any restriction growing out of the provisions of art. 10, § 8, Const. whether his land was acquired or his marriage was celebrated before or after its adoption.— *Hughes v. Hodges*, N. Car., 9 S. E. Rep. 437.

61. HOMESTEAD.—— Under Const. Ark. 1874, art. 9, § 6, minor children can recover of widow one-half the rents and profits of homestead, while she was in exclusive possession thereof after the husband's death, though no dower has been assigned her in the land, which was all the real estate owned by her husband, notwithstanding Mansf. Dig. § 2588. — *Winters v. Davis*, Ark., 11 S. W. Rep. 420.

62. HOMESTEAD.——A person making an entry under the homestead laws of the United States may execute a valid mortgage upon land so entered, prior to submitting final proof and receiving the final certificate.—*Lang v. Morey*, Minn., 42 N. W. Rep. 88.

63. HUSBAND AND WIFE. —— No resulting trust can arise out of an agreement between husband and wife, by which the husband takes the title to land in his own name, and pays part of the purchase price with his own money, and agrees to hold for the wife's benefit, and she subsequently pays the balance of the price.—*Zeller v. Light*, Penn., 17 Atl. Rep. 433.

64. HUSBAND AND WIFE. —— Under Pasch. Dig. Tex. art. 3457, the validity of a conveyance executed by a husband pending a divorce suit, so far as it affected the wife's interests in the community property, depended upon whether it was made with the fraudulent view of injuring her rights. — *Moore v. Moore*, Tex., 11 S. W. Rep. 396.

65. INFANCY—Chattel Mortgage. —— Where one executes a chattel mortgage while an infant, mere acqiescence or failure to disaffirm by some positive act of repudiation, after attaining majority, is not a legal ratification.—*Hill v. Nelms*, Ala., 5 South. Rep. 796.

66. INJUNCTION. —— Where parties financially irresponsible, without valid title, but claiming under a void attachment sale, cut timber constituting the principal value of the land purchased, of which others claiming under a purchase in bankruptcy proceedings are in possession, equity will enjoin the continuance of such trespass at the instance of the latter. — *Sullivan v. Robb*, Ala., 5 South. Rep. 746.

67. INJUNCTION — Party Wall. —— Construction of statute granting to one co-proprietor of a wall in common to demolish old wall and erect new one and defining the procedure. — *Heine v. Merrick*, La., 5 South. Rep. 760.

68. INSOLVENCY — Conflict of Laws. —— Rev. St. Me. ch. 70, § 83, providing that an assignment in insolvency relates back and dissolves all attachments made within four months of the commencement of insolvency proceedings, is binding upon a citizen of another State, who causes an attachment to be levied here for the enforcement of a debt contracted subsequent to the enactment of the insolvent law. — *Owen v. Roberts*, Me., 17 Atl. Rep. 403.

69. INSURANCE — Conditions. —— A policy contained covenants that the assured was to keep a set of books showing a record of all business transacted, and to keep them locked in a fire-proof safe at night and at all times when the store was not actually open for business, etc.: *Held*, that the covenant did not require the books to be kept in a safe from sunset to sunrise, but from the time the business of the day was ended, and the store closed for the night. — *Jones v. Southern Ins. Co.*, U. S. C. C. (Ark.), 38 Fed. Rep. 19.

70. INSURANCE—Mutual Benefit Society. —— Defendant held entitled to reformation of certificate, where there was a mistake in the amount of same, though the beneficiary was not cognizant of the mistake.— *Gray v. Supreme Lodge*, Ind., 20 N. E. Rep. 833.

71. INTOXICATING LIQUORS—Illegal Sales. —— Where an incorporated association purchases beer outside of the State of Kansas, and brings it into the State, and then sells chips to its members, each chip representing a drink or glass of beer, and then furnishes a drink or glass of beer for each chip returned by a member, and the beer is drank as a beverage, and neither the association, nor any of its members, has any permit to sell intoxicating liquors: *Held*, that the member of the association and the president of the association, who is present at the time, and knows of these things, may be prosecuted, convicted, and punished for selling intoxicating liquor in violation of law. — *State v. Horacek*, Kan., 21 Pac. Rep. 204.

72. INTOXICATING LIQUORS. —— Where the evidence shows respondent was proprietor of the saloon where the liquor was sold to the minors, and was then present, and made no effort to prevent the sale, he cannot object that there is no evidence, though he testifies that he did not see the sale, and had directed his agent not to sell liquor to minors. — *State v. Mayor*, Wis., 42 N. W. Rep. 110.

73. JUDGMENT— Fraud. —— The statute authorizing "the party aggrieved" to prosecute an action to set aside a judgment obtained by means of the fraud of the "prevailing party:" *Held*, not to authorize one not a party to the action in which such judgment was recovered, although he was directly interested in the results, to maintain such statutory action. — *Stewart v. Duncan*, Minn., 42 N. W. Rep. 89.

74. JUDGMENT—Res Adjudicata. —— Neither a judgment of nonsuit nor one dismissing a suit for want of proper parties will sustain the plea of *res adjudicata*, *Weinberger v. Merchants' Mut. Ins. Co.*, La., 5 South. Rep. 728.

75. LANDLORD AND TENANT — Lien. —— Under Code Miss. § 1301, a lien on all the agricultural products of the leased premises can be enforced against the agricultural products of the leased premises after their removal therefrom, and must prevail against a *bona fide* purchaser for value.—*Newman v. Bank of Greeneville*, Miss., 5 South. Rep. 753.

76. LIENS.——Under Code Ga. § 1985, providing liens on saw mills, an affidavit for lien properly alleges that the provisions were furnished to the mill of the person named, and not to the person himself.—*Bennett v. Gray*, Ga., 9 S. E. Rep. 469.

77. LIMITATION OF ACTIONS.——The limitation of two years prescribed by Civil Code Kan. § 18, subd. 3, for an action for trespass on real property, limits the damages recoverable to those caused within two years next proceeding the action, though the trespass was continued for more than two years, and the action was coupled with an action of ejectment, the limitation of which is three years.—*Mo. Pac. Ry. Co. v. Houseman*, Kan., 21 Pac. Rep. 284.

78. MALICIOUS PROSECUTION. — Concerning the necessity of disclosing all material facts of the case to counsel, in order to render his advise a good defense to an action for malicious prosecution. — *Smith v. Walter*, Penn., 17 Atl. Rep. 466.

79. MALICIOUS PROSECUTION.——Sufficiency of information under Pen. Code Tex. art. 273, providing punishment for malicious prosecution. — *Dempsey v. State*, Tex., 11 S. W. Rep. 372.

80. MALICIOUS PROSECUTION —— The facts herein held sufficient probable cause to justify defendant in instituting criminal proceedings. — *McDonald v. Atl. & Pac. R. R. Co.*, Ariz., 21 Pac. Rep. 338.

81. MASTER AND SERVANT—Negligence.——Under the facts where plank fell through elevator injuring plaintiff, the latter cannot recover either on the ground of negligence of fellow-servant or of being assigned to dangerous work.—*Alford v. Metcalf*, Mich., 42 N. W. Rep. 52.

82. MORTGAGES—Execution.—— Proof by a subscribing witness to a mortgage that he saw the mortgagor

sign the instrument, and acknowledged that he did so, is not sufficient proof of its execution to authorize its admission to record. — *Edwards v. Thom*, Fla., 5 South. Rep. 707.

83. MORTGAGES. —— Where a note and mortgage are proved to have been destroyed by fire, and their contents are proved without contradiction, it is immaterial, on foreclosure, that the mortgage, having but one witness, was not entitled to record. — *Coon v. Bouchard*, Mich., 42 N. W. Rep. 72.

84. MUNICIPAL CORPORATIONS. —— A special law, limiting the time for commencing actions against the city of St. Paul for injuries caused by its negligence, construed as not applicable to statutory actions by the personal representatives of a deceased person for negligence causing such death.— *Maylone v. City of St. Paul*, Minn., 42 N. W. Rep. 88.

85. MUNICIPAL CORPORATIONS.—— A land-owner has a right to the lateral support of the soil in the adjoining street, and a city is liable for any damage occasioned by removing this lateral support in grading the street. —*Nichols v. City of Duluth*, Minn., 42 N. W. Rep. 84.

86. MUNICIPAL CORPORATIONS— Public Improvements. —— Under the charter of the city of Galveston, providing that the council, before beginning any street improvements, shall cause an estimate and report of the probable cost to be made, the report is a condition precedent to the exercise of the power to order the work to be done. — *Frosh v. City of Galveston*, Tex., 11 S. W. Rep. Rep. 402.

87. MUNICIPAL CORAORATIONS.——A contract by which a municipal corporation in effect agrees to loan its credit to a proposed private corporation is forbidden by Const. Tex. art. 11, § 3. — *City of Cleburne v. Brown*, Tex., 11 S. W. Rep. 404.

88. NEGLIGENCE. —— In an action for the death of a fireman on defendant's locomotive, evidence of declarations of defendant's servants as to the character of the engine, which was alleged to have been unsafe, made since the accident, and not being in contradiction of the testimony of such servants, is inadmissible.—*Erie & W. V. R. Co. v. Smith*, Penn., 17 Atl. Rep. 443.

89. NEGLIGENCE. —— A complaint alleging that defendant, being lawfully in possession of plaintiff's side track, negligently placed a freight-car so near plaintiff's main track that plaintiff's train collided with it, whereby its cars were damaged, shows a cause of action. — *Montgomery Gas-Light Co. v. Montgomery & E. Ry. Co.*, Ala., 5 South. Rep. 735.

90. NEGLIGENCE. —— A person traveling on a train which has with it a stock car carrying horses for him, his duty under his contract being "to feed, water, and take care of the horses," is not guilty of contributory negligence from the fact that he was on said car when he was injured, if he was on the car in the performance of this duty.—*Fla. Ry. & Nav. Co. v. Webster*, Fla. 5 South. Rep. 714.

91. NEGLIGENCE—Railroad Companies. —— Rev. St. Tex. art. 2899, authorizing an action against a railroad company for injuries causing death, when the death was caused by the negligence of the proprietor, or by "the unfitness, gross negligence, or carelessness of the servants," makes the company liable for gross negligence, and not for ordinary negligence, of servants. — *Sabine & E. T. Ry. v. Hanks*, Tex., 11 S. W. Rep. 877.

92. NEGLIGENCE—Evidence. —— It was not error to receive evidence of doubtful admissibility, and such was the character of the evidence showing the high speed at which the same engine was habitually run by the same engineer at the same place, and that he habitually neglected to ring the bell. — *Savannah, etc. Ry. Co. v. Flanagan*, Ga., 9 S. E. Rep. 471.

93. NEGOTIABLE INSTRUMENT. —— In an action on a note given by the defendant to the plaintiff, a canal company, for some of its stock, alleged misrepresentations made by the plaintiff are not available to the defendant, where he has not elected to rescind the contract for the sale of stock, and has not set up any counter-claim for damages on account of such misrepresentations.— *Upper San Joaquin Canal Co. v. Roach*, Cal., 21 Pac. Rep. 804.

94. PARENT AND CHILD.——The law will not imply an *assumpsit* by the father of an infant which is in custody of its mother under a decree of divorce making no provision for alimony, to pay the mother's second husband for the infant's support, when the father has made no demand for the custody of the child, and the mother's second husband has never asked for pay for its maintenance.—*Johnson v. Onsted*, Mich., 42 N. W. Rep. 62.

95. PARTNERSHIP.——On dissolution of a partnership, one member assigned all his interest in the firm assets to his sole copartner, to be by the latter applied to firm debts. Immediately thereafter the latter conveyed all his property of every kind in trust to pay his debts, with no reference to partnership assets or creditors: *Held*, that such conveyance was void as to partnership creditors.—*Collier v. Hanna*, Md., 17 Atl. Rep. 390.

96. PARTNERSHIP—Dissolution. —— On dissolution of a copartnership existing under an agreement, whereby each member contributed equal capital, and were to share the profits and losses equally, advances made by one partner in excess of the amount agreed to be contributed by him must be repaid to him out of the partnership property remaining after paying partnership debts, before the surplus to be divided among the partners, or the loss to be apportioned, can be ascertained.—*Leserman v. Bernheimer*, N. Y., 20 N. E. Rep. 869.

97. PARTNERSHIP. —— Plaintiff and W were partners under an agreement which provided that the orignal amount put into the business, and the amounts received in the course of business, should be the property of plaintiff, and that W should receive as his compensation one-half of the net profits: *Held*, that this agreement was binding upon defendant, who had full knowledge of it, and that plaintiff was entitled to recover of him funds, other than one-half of the profits, which W had turned over to him in payment of his own individual debt.—*Campbell v. Pence*, Ind., 20 N. E. Rep. 840.

98. PAYMENT— Administrators. —— An overpayment made after the settlement of the estate by an executor to a legatee under the mistaken impression that the will authorized it, is not a voluntary payment, and may be recovered.—*Lyle v. Siler*, N. Car., 9 S. E. Rep. 491.

99. PLEADING—Corporations. —— An allegation as to the corporate existence of a defendant may be stated in the complaint independently of a cause of action, and is no part of it.—*West v. Eureka Imp. Co.*, Minn., 42 N. W. Rep. 87.

100. PLEADING. —— When a defendant demurs to a complaint and the court overrules such demur, and the defendant refuses to further plead, and the court renders judgment against him, he waives the right to urge thereafter such dilatory matter as an omission to allege the county or venue in the complaint in replevin. *Marx v. Croisan*, Oreg., 21 Pac. Rep. 310.

101. PRACTICE IN CIVIL CASES. —— In Arizona, an involuntary nonsuit is not proper under Rev. St. Ariz. § 764, providing that at any time before the jury have retired the plaintiff may take a nonsuit, but he shall not thereby prejudice the right of an adverse party to be heard on his own claim for affirmative relief. — *Bryan v. Pinney*, Ariz., 21 Pac. Rep. 332.

102. RAILROAD COMPANIES. —— A claim by the consignee of goods against a railroad company as a common carrier, for the value of goods lost by fire while in possession of the carrier, and before the road is placed in the hands of a receiver in a foreclosure suit, is not entitled to a priority, before the claims of the bondholders. — *Easton v. Houston & T. C. Ry. Co.*, U. S. C. C. (Tex.), 38 Fed. Rep. 12.

103. RAILROAD COMPANIES—Negligence.——A railroad company, having established at a street crossing a gate under the care of a flagman, is bound to close the gate when its cars are passing over the crossing, to give a reasonable warning by whistle or bell, and to pass the

crossing at a reasonably safe speed. — *Whelan & New York, L. E. & W. R. Co.*, U. S. C. C. (Ohio), 38 Fed. Rep. 15.

104. RAILROAD COMPANIES—Taxation. —— The facts found by the trial court, construed in connection with the written instrument set forth in the complaint: *Held*, to bring this case within the rule laid down in the case of plaintiff v. McDonald, 34 Minn. 182, 25 N. W. Rep. 57, and the lands in controversy are accordingly subject to taxation under Laws 1865, ch. 15, § 5.— *St. Paul & S. C. R. Co. v. Robinson*, Minn., 42 N. W. Rep. 79.

105. RAILROAD COMPANY—Damages.—— Where town lots abut upon a street, along which a railroad is constructed, so near as to cause an embankment in the street, so as to deprive the lot-owner of the free use of the streets, to the damage of the owner, he may recover his damages from the railroad company, even though no part of the lot be taken. — *Chicago, K. & N. Ry. Co. v. Hazels*, Neb., 42 N. W. Rep. 93.

106. RECEIVER — Mortgage. —— Lands included in a mortgage, which covered also the crops, were incumbered by a prior mortgage to the extent of their value. The debt secured by the mortgage was past due, the mortgagor was insolvent, and refused to deliver the crops to the mortgagee, and appropriated a portion of them to purposes other than payment of the mortgage debt. The crops were in danger of loss unless promptly taken into custody of the court, and the security without them was inadequate: *Held*, that a bill by the mortgagee against mortgagor, averring those facts, showed a *prima facie* case for the appointment of a receiver.—*Ashurst v. Lehman*, Ala., 5 South. Rep. 731.

107. REHEARING.—— A rehearing will not be granted where the question which the petition alleges to have been omitted to be decided by the court are necessarily determined, though not in express terms, by the determination of an alternative question in the case. — *State v. Barnes*, Fla., 5 South. Rep. 703.

108. REMOVAL OF CAUSES. —— In foreign attachment proceedings, where the defendant files a petition for the removal of the suit to the circuit court of the United States, alleging that the amount involved is sufficient to give jurisdiction to the federal court, and that the plaintiffs are citizens of Georgia, while the defendant is a citizen of England, and the record, down to the time of filing the petition, does not show the residence of the parties, nor the amount involved to be otherwise than as alleged by defendant, it is error for the court to refuse to grant the petition. — *Horan v. Strachan*, Ga., 9 S. E. Rep. 429.

109. REMOVAL OF CAUSES — Constitutional Law. —— Since the inferior federal courts owe their existence and powers entirely to congress, that body has full power over them. The provision of the act of March 3, 1887, therefore, that the circuit court shall remand a cause removed, etc., is not, as regards pending causes, unconstitutional.—*Birdseye v. Shaeffer*, U. S. C. C. (Tex.), 37 Fed. Rep. 821.

110. REPLEVIN—Attachment. —— A defendant in an attachment suit, whose goods are seized by an officer in obedience to the writ, cannot maintain replevin against the officer for the goods so taken into legal custody.—*Hawk v. Lepple*, N. J., 17 Atl. Rep. 351.

111. REPLEVIN—Evidence—Fraud.——Plaintiff owned a horse, which his brother sold as his own to defendant, and assigned the note taken in payment to plaintiff, who brought replevin on the ground of misrepresentations as to the property of the sureties on the note: *Held*, that plaintiff could reply on these representations, and could show what was done at the sale, and what was said by the seller and by defendant, and for whom the seller was acting at the sale.—*Pangborn v. Ruemenepp*, Mich., 42 N. W. Rep. 78.

112. SALE—Mortgage. —— An instrument of writing by which the maker binds himself to pay a sum of money, and mortgages and conveys a mule as security, with a recital that part of the debt is the purchase money for the mule, and a further provision that it was to remain the vendor's property until paid for, shows a conditional sale, with reservation of title. — *Smith v. DeVaughn*, Ga., 9 S. E. Rep. 425.

113. SALE — Parol Evidence. —— Where a sale of a chattel is consummated by a written bill of sale, which contains a description of the property, the receipt for the purchase money, and a warranty of title, parol evidence is inadmissible to prove an additional parol warranty of the soundness of such chattel. — *Rodgers v. Perrault*, Kan., 21 Pac. Rep. 287.

114. SLANDER.——Words are actionable in themselves only where an offense is imputed by them for which the party is liable to indictment and punishment, either at common law or by statute. To say of a married woman that she is a prostitute is necessarily to impute to her the guilt of adultery, and, as adultery is indictable, such words are actionable *per se*.—*Davis v. Sladden*, Oreg., 21 Pac. Rep. 140.

115. SPECIFIC PERFORMANCE. —— Where a written contract is entered into to discontinue an action in the marine court, and to vacate a judgment entered therein, in favor of a defendant, and such contract is lost, there is no adequate remedy at law for a violation of such contract, and an action may be maintained for specific performance.—*Deen v. Milne*, N. Y., 20 N. E. Rep. 861.

116. TAXATION—Sale.——Rev. St. Ind. 1881, § 6487, providing that no tax sale shall be valid if the description is so imperfect as to fail to describe the land with reasonable certainty, etc., applies to a suit brought after its passage to set aside a sale made previously. — *Millikan v. City of La Fayette*, Ind., 20 N. E. Rep. 847.

117. TELEGRAPH COMPANY—Negligence.——As to the negligence of telegraph company in giving wrong name of place from which money was telegraphed. — *West. Union Tel. Co. v. Simpson*, Tex., 11 S. W. Rep. 385.

118. TRIAL — Instructions. —— Where the jury are correctly instructed that if they find certain facts they shall find for the plaintiff, it is not error to refuse to give the converse of the proposition, that if they do not find such facts they shall find for the defendant.—*Clark v. Carlisle Gold Min. Co.*, N. Mex., 21 Pac. Rep. 356.

119. TRUSTS—Purchase Money.——Where a purchaser of lands, unable to make the deferred payment, borrows for that purpose money from a third person, to whom he procures the title to be conveyed by his vendor, the third person agreeing to convey to the purchaser upon repayment of advances, the relation between the parties is that of vendor and vendee and not mortgagee and mortgagor.— *Mosely v. Mosely*, Ala., 5 South. Rep. 732.

120. TRUSTS. —— Where a trustee obtains from his *cestui que trust* a release of his contingent remainder in the trust fund, for inadequate consideration, without informing him that a part of the fund has been used in the purchase of land which has been conveyed to the trustee's wife, such release should be held invalid for the suppression of a material fact.— *Waldrop v. Leaman*, S. Car., 9 S. E. Rep. 466.

121. VENDOR AND VENDEE. —— Whoever purchases land upon which a former vendor or lessor has imposed an easement, charge, or restriction in the manner of its use, such as would be enforced by a court of equity as against his vendee or lessee, the party purchasing the land with notice will take it subject to such easement, charge, or restriction. — *Newbold v. Peabody Heights Co.*, Md., 17 Atl. Rep. 372.

122. VENDOR AND VENDEE. —— An absolute and unconditional deed of premises, in which the consideration is expressed to be that the grantee shall provide for the support of the grantor during her natural life, cannot be rescinded on the ground of the subsequent failure of the grantee to furnish the promised support.— *Meyer v. Swift*, Tex., 11 S. W. Rep. 378.